No. 25-

IN THE

Supreme Court of the United States

SANDRA HERNDEN,

Petitioner,

v.

CHIPPEWA VALLEY SCHOOL DISTRICT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In light of our current toxic and vindictive politics and a circuit split, under a-person-of-ordinary-firmness test, does a referral by one governmental official to another governmental official for a potential criminal investigation constitute adverse action sufficient to meet the elements of a First Amendment retaliation claim where there is no indication that the petitioner was ever investigated?

CORPORATE DISCLOSURE STATEMENT

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STATEMENT OF RELATED PROCEEDINGS

Hernden v. Chippewa Valley Schools, et al, No. 22-cv-12313, U.S. District Court for the Eastern District of Michigan. Judgment entered September 30, 2024.

Hernden v. Chippewa Valley School District, et al, No. 24-1842, U.S. Court of Appeals for the Sixth Circuit. Judgment entered September 16, 2025.

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The Sixth Circuit's opinion affirming the district court's order is unreported, but is reprinted at App.1a–23a.

JURISDICTIONAL STATEMENT

The District Court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331. This is an appeal from the District Court's final judgment and order entered on September 30, 2024, denying Petitioner Hernden's Motion for Summary Judgment and granting Respondents' Motion for Summary Judgment.

That decision was appealed to the Sixth Circuit and affirmed by that court on September 16, 2025.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof …." The Fourteenth Amendment to the United States Constitution provides, in relevant part:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION

During the COVID-19 pandemic, public policy choices relating to the education of children became a core focus of public discourse. That discourse generally fell into two categories: support of in-person instruction and defense of the need for remote learning. These divisions were intense, often leading to clashes between citizens and public officials over what was best for children.

These clashes led to an extraordinary September 29, 2021, letter from high ranking officials at the National School Boards Association ("NSBA") to the Biden Administration, which had some advance knowledge of the letter's contents according to a report written by the Michael Best & Friedrich LLP law firm.[1] Referencing

1. Final Report on the Events Surrounding the National School Boards Association's September 29, 2021, Letter to the President at 2:

> [T]he White House, namely White House Senior Advisor to the President Mary C. Wall ("Ms. Wall"), had advance knowledge of the planned Letter and its specific contents and interacted with [the interim director and CEO of NSBA] regarding the Letter during its drafting. In addition, evidence indicates that White House officials discussed the existence of the Letter, its requests, and the contents of the Letter with Department of Justice officials more than a week before the Letter was finalized and sent to President Biden.

incidents at around a dozen school boards,[2] the NSBA letter sought "joint collaboration" between the Federal Bureau of Investigations ("FBI"), Homeland Security, Secret Service among others to fight "acts of malice, violence, and threats against public school officials."[3] NSBA wanted to have these agencies "examine appropriate enforceable actions" as "domestic terrorism" under the PATRIOT Act and other federal statutes.[4]

Five days later, on October 4, 2021, noting a "disturbing spike in harassment, intimidation, and threats of violence against school administrators, board members, teachers, and staff," the Attorney General of the United States indicated the Department of Justice was "committed to using its authority and resources to discourage these threats, identify them when they occur, and prosecute them. . . ."[5] The Attorney General directed the FBI and U.S. Attorneys to "convene meetings with federal, state, local, Tribal, and territorial leaders in each federal judicial district within 30 days of the issuance of

2. According to the National Center for Education Statistics, in 2024, there were 13,303 school districts in America. https://nces.ed.gov/whatsnew/press_releases/12_5_2024.asp. The National Center for Education Statistics is an arm of the Institute for Education Sciences, which describes itself as "the statistics, research, and evaluation arm of the U.S. Department of Education." https://ies.ed.gov/about.

3. https://www.documentcloud.org/documents/21094557-national-school-boards-association-letter-to-biden/

4. *Id.*

5. District Court ECF No. 1, Ex. C.

this memorandum."[6] The meetings were to "facilitate the discussion of strategies for addressing threats against school administrators, board members, teachers, and staff, and . . . open dedicated lines of communication for threat reporting, assessment, and response."[7]

Also on October 4, 2021, the Department of Justice issued a press release announcing that: "Threats of violence against school board members, officials, and workers in our nation's public schools can be reported by the public to the FBI's National Threat Operations Center" via a 1-800 number and "online through the FBI website (http://fbi.gov/tips)."[8]

This case concerns whether a school board and its president engaged in First Amendment retaliation for using the online threat reporting site to chill the speech of a parent who opposed the board's policies.

STATEMENT OF THE CASE

Petitioner Sanda Hernden is the mother of three children, including a special needs child. Two of her children, at the relevant time, were educated in Respondent Chippewa Valley School District.[9]

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6. *Id.*

7. *Id.*

8. https://www.justice.gov/archives/opa/pr/justice-department-addresses-violent-threats-against-school-officials-and-teachers.

9. In the Complaint, Petitioner had named the Chippewa Valley School Board as a defendant and not the Chippewa Valley School District. The error was raised to the District Court, and it held:

Petitioner's special-needs child saw his grade point average drop from 3.5 to 1.5 during the period when Respondent school district did not have in-person instruction during COVID. Complaint at ¶ 15. Petitioner believed the lack of in-person instruction and her son's performance were related and "became a vocal opponent to the COVID-19 policies requiring remote learning." *Id*. at ¶ 16. She would attend and testify at Chippewa Valley School Board meetings and send emails to board members. *Id*. at 17.

One of the days that Petitioner addressed the Chippewa Valley School Board was September 13, 2021.[10] In discussing her opposition to Critical Race Theory and

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> [T]he Court agrees that the proper entity to be subject to this suit is the District, not the Board. The District does not seek dismissal on this basis; rather, it notes that it was "inappropriate[]" for Hernden to sue the Board, and it captions its motion with the District as the "correctly designated" party.

App.41a–42a.

There are also some references in the lower court records to Petitioner living outside the district. That is correct, but irrelevant. Chippewa Valley operates a school-choice program that allows students outside the district to attend. See generally, Mich. Comp. Laws § 388.1705. When Petitioner was addressing the Chippewa Valley School Board, she was addressing the board of the school district where at least two of her children were being educated.

10. The video of the meeting can be found here. https://www.youtube.com/watch?v=PlO5JFDvo68. This link was included in Petitioner's trial court exhibit list. District Court ECF No. 16 at 9. Public comment begins at 59:06, with a discussion of the rules going until 1:00:42. Petitioner's comment begins at 1:03:31 and continues until 1:09:15.

Social Emotional Learning, Petitioner made an analogy to Nazism and discussed her uncle that had been sent to a concentration camp for hiding Jewish people from the Nazis. She also discussed her conflict with Board member Elizabeth Pyden.[11] Twice, Respondent Frank Bednard interrupted Petitioner's comment as being not germane.

The lead opinion at the Sixth Circuit discussed Bednard's reaction to this public testimony:

> On September 13, 2021, Hernden participated in public comment at a school board meeting. Defendant Frank Bednard, Board President and a retired police officer, observed that Hernden's demeanor was "much

11. For context, at the lower courts, there was a claim against Pyden, which concerned events that occurred months earlier. Pyden and Petitioner had clashed via email over in-person instruction. Eventually Pyden sent an email to Petitioner's supervisor, which in Petitioner's view, was an attempt to get Petitioner fired. Additionally, that email contained a spurious "veiled racism" characterization. The ensuing internal investigation by her employer cleared Petitioner but led her to seek and obtain a job in a different police department. Those events with Pyden and the board's reaction to them remained a point of contention.

The Sixth Circuit's lead opinion recites various Pyden accusations about Petitioner, without noting they were disputed at Petitioner's deposition – (District Court ECF 25, Ex. A pp. 57-58). Given the Sixth Circuit's holding that Pyden was not a state actor, none of these accusations were necessary to its decision.

Regardless, no claim against Pyden is made in this Petition and this footnote is not a request for error correction but rather provided to give background to the claims made here.

> more serious than when normally addressing the Board," and that "[s]he seemed very angry and very agitated." Bednard Aff., R. 25-4, Page ID #389. Hernden's public comment "began with a history of the publication of Adolf Hitler's *Mein Kampf* and a description of how Nazi Germany labeled Jewish individuals with 'yellow badges.'" *Id.* Because these comments "went on for some time and appeared to be irrelevant to District matters, [Bednard] attempted to direct [Hernden] to explain how this commentary related to the District." *Id.* at Page ID #390. Hernden proceeded to "tell[ ] a story about a family member." *Id.* When Bednard again attempted to direct Hernden to address District matters, "she yelled several times in response that she was getting to her point." *Id.* Hernden then compared the Board's pandemic mask-policy to Nazi Germany. Bednard testified that, as a retired police officer with "30 years of experience and training in reading an individual's behavior," Hernden's "aggressive behavior shocked and scared [him]." *Id.*

App.5a.

As noted above, on September 29, 2021, the NSBA sent its letter to the Biden Administration. Attorney General Garland's memo was issued on October 4, 2021.

That same day, Petitioner Hernden sent Respondents the following message:

> Once again, law on parents side. Maybe a lil more due care and caution at the next meeting Frank. You know, when you let your hatred you have for me take hold and you interrupt me.
>
> 1st 2 were free…

Complaint at § 50, Ex. B (errors original, spacing cleaned up). Petitioner Hernden then provided a hyperlink to an article discussing *Ison v. Madison Local School District Board of Education*, 3 F.4th 887 (6th Cir. 2021), which held that certain school board rules related to preventing "abusive," "personally directed," and "antagonistic statements" were an unconstitutional form of viewpoint discrimination. Petitioner maintains that she provided this link because she believed the school board was violating her First Amendment rights by preventing her from speaking at its meetings, and she intended to counsel the Respondents against continuing to violate her rights.

The following day, Respondent Bednard sent the DOJ a message via a tip line. Respondent Bednard's message read:

> Hello DOJ,
>
> I appreciate your looking into these groups of people who bring such threats to anybody that stands in their way. The email I included below is from Sandra Hernden. This woman, Sandra Hernden, comes to every meeting to harass our board, administration, and community who oppose her views. She is over dramatic, and

> refuses to listen to any direction I may give her about her inappropriate and threatening comments. Last week she compared the tattoos Nazi Germany gave Jewish people to identify them in WW2 to Masking mandate of today (even though mask are not mandated in our district). We understand that Sandra has no children in our schools,[12] is not a resident of our district, and goes around to school board meetings throughout the tri county area to promote her agenda in any way that she can including threats and intimidation. She is part of a group called, "Mothers of Liberty" that attend our meetings. This group of people attend every meeting, and because their threats and demeanor are so intimidating, no community members who oppose their message will come to the meeting to speak because they are afraid of what this group would do to them for standing up to them.
>
> Our school district has over 15,000 students. We know that they have not gained any traction as it is the same 10-15 people that show up every meeting to intimidate, threaten, and harass. Anything that could be done to curb this behavior by these people would be greatly appreciated by our board, administration, and our community.
>
> Thank you!

Complaint at § 53, Ex. B (errors original).

12. As noted above, this was factually incorrect.

Petitioner Hernden was not aware of this communication immediately—she later learned of it through a friend, who had received it via a Michigan Freedom of Information Act request. To date, Petitioner Hernden has not been contacted by the DOJ.

Pertinent here, Petitioner filed a First Amendment retaliation claim against Bednard and the Chippewa Valley School District. The District Court granted Respondents summary judgment on September 30, 2024. The holding was that Respondent Bednard was not liable since Petitioner did not have an objective fear of being prosecuted by the DOJ. That holding entitled Respondent Chippewa Valley School District to dismissal as well under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). App.19a.

An appeal to the Sixth Circuit followed and on September 16, 2025, the dismissal was upheld. Judges Clay and Stranch noted that Petitioner's "speech at the school board meetings was a constitutionally protected activity" under the first element of a First Amendment retaliation claim. App.10a–11a. Petitioner's claim against Bednard was held to fail the adverse-action prong of a First Amendment retaliation claim. Judges Clay and Stranch indicated that Petitioner could not proceed without actual damages: "For example, we found no adverse action in a state investigation where the plaintiff alleged no injury besides emotional damages." App.16a. Along those same lines, the lead opinion stated: "Because the plaintiff suffered no specific or concrete injury, and 'was not threatened with a continuing governmental investigation,' . . . we held that any adverse action was

'inconsequential as a matter of law.'" App.17a. They also noted Petitioner's subjective lack of knowledge of any investigation. App.17a.

Finally, the lead opinion indicated that there was not "any law that would have provided Bednard with 'fair warning" that his email to DOJ could be unconstitutional." App.19a. In other words, even if Bednard had violated the Constitution, he was entitled to qualified immunity.

Judge Kethledge concurred. Unlike his colleagues, he would have held the reporting to the DOJ constituted adverse action:

> I think that a reasonable jury could find that the emails sent by . . . board president Frank Bednard . . . were adverse actions for the purposes of [Petitioner's] First Amendment claim. . . .
>
> The same is true of Bednard's email to the Attorney General Garland, just one day after he announced the FBI's willingness to investigate people who make threats at school-board meetings and to "prosecute them when appropriate." Threatening behavior is exactly what Bednard complained about in his email; and Bednard ended the email by asking the Attorney General—the Nation's highest law-enforcement officer—to do "anything that could be done to curb [Hernden's] behavior." And just about the only thing that the Attorney General could have "done" in response to Bednard's

> request would have been to commence or threaten some kind of legal (possibly criminal) action against Hernden. Thus a jury could find that a person of ordinary firmness would be chilled by news of that email too.

App.21a–22a.

Judge Kethledge concurred with his colleagues that Respondent Bednard was entitled to qualified immunity for any constitutional violation: "Bednard is entitled to qualified immunity unless Hernden has shown that the existing caselaw made clear to Bednard that his email would violate her constitutional rights." App.22a. Judge Kethledge focused on the portion of Bednard's DOJ submission that referenced Petitioner's "allegedly threatening behavior, rather than her speech." App.22a. He construed Petitioner's October 4, 2021 e-mail with the link to the Sixth Circuit decision limiting school boards' ability to ban speech at public forums not as a legal threat, but potentially as something more sinister. App.22a–23a.

This Petition for Writ of Certiorari was then timely filed.

REASONS FOR GRANTING THE WRIT

I. First Amendment retaliation claims require protected speech and a causally connected adverse action from a government official based on that speech, but this Court has not settled on an adverse-action test.

This Court has addressed First Amendment retaliation several times in the last decade. Included within those cases are the general framework for making such claims and an admission that this Court has not settled on a test for what constitutes "adverse action."

In *Nieves v. Bartlett*, 587 U.S. 391 (2019), this Court stated:

> "[A]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions" for engaging in protected speech. *Hartman v. Moore*, 547 U.S. 250, 256, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006). If an official takes adverse action against someone based on that forbidden motive, and "non-retaliatory grounds are in fact insufficient to provoke the adverse consequences," the injured person may generally seek relief by bringing a First Amendment claim. *Ibid.* (citing *Crawford-El v. Britton*, 523 U.S. 574, 593, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998); *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 283–284, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977)).

> To prevail on such a claim, a plaintiff must establish a "causal connection" between the government defendant's "retaliatory animus" and the plaintiff's "subsequent injury." *Hartman*, 547 U.S. at 259, 126 S.Ct. 1695. It is not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured—the motive must *cause* the injury. Specifically, it must be a "but-for" cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive. *Id.*, at 260, 126 S.Ct. 1695 (recognizing that although it "may be dishonorable to act with an unconstitutional motive," an official's "action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway").

Nieves, 587 U.S. at 398-99.

In *Richards v. Perttu*, 96 F.4th 911 (6th Cir. 2024), the Sixth Circuit interpreted the above to mean a First Amendment retaliation plaintiff needs to meet three elements:

> (1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in the conduct; and (3) there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by the plaintiff's protected conduct.

Id. at 917.

But, on adverse action, this Court has stated:

> To distinguish material from immaterial adverse actions, lower courts have taken various approaches. Some have asked whether the government's challenged conduct would "chill a person of ordinary firmness" in the plaintiff's position from engaging in "future First Amendment activity." *Nieves*, 587 U. S., at ––––, 139 S.Ct., at 1721 (internal quotation marks omitted). Others have inquired whether a retaliatory action "adversely affected the plaintiff's ... protected speech," taking into account things like the relationship between speaker and retaliator and the nature of the government action in question. *Suarez Corp. Industries v. McGraw*, 202 F.3d 676, 686 (CA4 2000). But whether viewed through these lenses or any other, it seems to us that any fair assessment of the materiality of the Board's conduct in this case must account for at least two things.[13]

Houston Cmty. Coll. Sys. v. Wilson, 595 U.S. 468, 477 (2022). Thus, this Court has not settled on an adverse-action test despite the frequency with which First Amendment retaliation claims are made.

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13. *Houston Community College* concerned the verbal censure of a council member by his colleagues. The two factors identified by this Court in that circumstance tending against materiality were: (1) the plaintiff was an elected official; and (2) the purported adverse action was "itself a form of speech" from the plaintiff's fellow elected officials. *Houston Cmty. Coll. Sys.*, 595 U.S. at 478. Neither factual circumstance applies here.

A. First Amendment retaliation claims related to prosecutions and arrests have special rules that do not apply in the instant matter.

This petition relates to a threat initiated by a government official and a government body by referring Petitioner to a recently formed task force seeking to prosecute purported school board threats. This Court has discussed tangentially related concepts of prosecutions that are based on First Amendment retaliation and arrests that are based on First Amendment retaliation. But those cases concern special types of defendants – prosecutors and police officers – and do not apply to threats made by other types of government officials or bodies.

In *Nieves*, this Court discussed First Amendment retaliatory prosecution claims and retaliatory arrest claims. With prosecution claims, it was noted that prosecutors generally have immunity when bringing suit and therefore these claims require a plaintiff to "plead and prove the absence of probable cause for the underlying criminal charge." *Id.* at 400. With First Amendment retaliatory arrest claims this Court held that those are like prosecution claims: "For both claims, it is particularly difficult to determine whether the adverse government action was caused by the officer's malice or the plaintiff's potentially criminal conduct." *Id.* at 402. Thus, retaliatory arrest claims generally can be defeated by showing there was probable cause for an arrest. This Court did leave one avenue for plaintiffs, "we conclude that the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Id.* at 407.

In *Gonzalez v. Trevino*, 602 U.S. 653 (2024), this Court clarified the *Nieves* exception's relations to the general *Mt. Healthy* framework:

> This requirement flows from the recognition that the *Nieves* exception serves only as a gateway to the *Mt. Healthy* framework. The *Nieves* exception asks whether the plaintiff engaged in the type of conduct that is unlikely to result in arrest or prosecution. By contrast, the *Mt. Healthy* inquiry is keyed toward whether the defendant's adverse decision was influenced by the plaintiff's constitutionally protected speech.

Gonzalez, 602 U.S. at 667.

The instant matter is not a retaliatory prosecution or a retaliatory arrest. Rather, it is a reporting to the country's top law enforcement official with the intent that: "Anything that could be done to curb this behavior by these people would be greatly appreciated by our board, administration, and our community." App.7a. Thus, it is a report by one governmental official to a second government official with the second official having the power to investigate in the first official's hope that an investigation or the threat of an investigation will chill an individual's speech.

II. Application of the First Amendment retaliation test shows Petitioner's case should not have been dismissed.

A. Petitioner's speech to the Respondent school board was protected activity.

The initial requirement of a First Amendment retaliation claim is that it involves protected speech. Petitioner's September 13, 2021, speech before Respondent Bednard and the Chippewa Valley School Board qualifies.

Disparaging speech is protected by the First Amendment. *Matal v. Tam*, 582 U.S. 218 (2018). Immoral or scandalous speech is protected by the First Amendment. *Iancu v. Brunetti*, 588 U.S. 388 (2019). Thus, even if Respondent Bednard and the Chippewa Valley School Board thought Petitioner's September 13, 2021, Nazi analogy was overwrought, inappropriate, or merely inartful, the speech was still protected.[14]

All three judges on the Sixth Circuit panel agreed that Petitioner was engaged in protected activity.

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14. The Sixth Circuit's lead opinion notes that Petitioner is a member of Mom's for Liberty (not disputed) and then cites the Southern Poverty Law Center's characterization of the group as "extremist" (the existence of the characterization is not disputed, but its accuracy is). App.2a. The inclusion of this characterization in the opinion seems unnecessary – Petitioner's constitutional rights do not vary depending on whether the Southern Poverty Law Center likes the group she associates with.

B. An investigatory threat should constitute adverse action that would deter a person of ordinary firmness from engaging in First Amendment speech, but there is circuit conflict on this point.

1. The Sixth Circuit's analysis of the adverse-action question is flawed.

As noted above, the Sixth Circuit's second element for First Amendment retaliation claims is "an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in the conduct." *Richards v. Perttu*, 96 F.4th at 917.

Here, the three Sixth Circuit judges disagreed about adverse action. Judges Clay and Stranch held Petitioner did not show adverse action. They recognized that some threats could meet that element. App.15a. The first they noted was a threat to one's "economic livelihood." *Id.* Turning to "a credible threat of criminal prosecution" they indicated such claims were possible where there is "a specific objective harm." App.16a.

But they held there was no "objective chill" to Petitioner's speech and stated that "speculative or subjective harm do not establish a First Amendment retaliation claim." App.16a.

Judges Clay and Stranch cited some Sixth Circuit decisions in support, but not decisions from this Court or other circuits. *Wurzelbacher v. Jones-Kelley*, 675 F.3d 580 (6th Cir. 2012) was cited for the proposition that:

"Inconsequential actions are thus 'properly dismissed as a matter of law.'" App.14a.

In *Wurzelbacher*, Joe Wurzelbacher, more commonly known as "Joe the Plumber," was questioned by then presidential candidate Barack Obama during a Toledo, Ohio stop on the 2008 Presidential campaign. Wurzelbacher's exchange was replayed "on stations across the country." *Id.* at 581. This led to him being a frequent media guest. It also raised the ire of some Ohio government workers who were supporters of then Senator Obama. Four days after the exchange, these supporters took the opportunity to access various state databases to conduct opposition research on Wurzelbacher. *Id.* at 582. This unauthorized access led to an Ohio Inspector General investigation which in turn led to two resignations and a termination. *Id.* at 582-83. Several months after the incident, Wurzelbacher filed a First Amendment retaliation claim.

The Sixth Circuit discussed whether Wurzelbacher had met the adverse action requirement. That court noted that "if any information was obtained, it was never publicly disclosed." *Id.* at 584. Further, it stated that "Wurzelbacher was not threatened with a continuing governmental investigation, and he does not allege that defendants' actions in fact caused a 'chill' of his First Amendment rights." *Id.*

Despite setting forth an objective test – "a person of ordinary firmness" – in *Wurzelbacher*, the Sixth Circuit looked at the plaintiff's personal reaction: "Our conclusion is supported by the fact that Wurzelbacher was not deterred or chilled in the exercise of his First Amendment rights as a result of defendants' wrongful

conduct." *Wurzelbacher*, 675 F.3d at 585.

But if adverse action is an objective test, the question is not how a plaintiff reacted, it is how a person of ordinary firmness would react. If our objective person of ordinary firmness would be chilled by how a plaintiff was treated by a governmental official, then the element is met. The Ninth Circuit explained why the focus is not on the plaintiff:

> Because it would be unjust to allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity, we conclude that the proper inquiry asks "whether an official's acts would chill or silence a person of ordinary firmness from future First Amendment activities." *Crawford–El v. Britton,* 93 F.3d 813, 826 (D.C.Cir.1996), *vacated on other grounds,* 520 U.S. 1273, 117 S.Ct. 2451, 138 L.Ed.2d 210 (1997) (internal quotation marks and citation omitted).

Mendocino Env't Ctr. v. Mendocino Cnty., 192 F.3d 1283, 1300 (9th Cir. 1999).

In this case, the Sixth Circuit also seems to require some sort of compensatory or economic harm for a First Amendment retaliation claim. Such a requirement would be in direct conflict with this Court's decision in *Uzuegbunam v. Preczewski*, 592 U.S. 279 (2021). There, this Court made clear that: "Nominal damages are not a consolation prize for the plaintiff who pleads, but fails to prove, compensatory damages." *Id.* at 290. Thus, if Petitioner can show that a person of ordinary firmness would be chilled if a governmental official reported her to the U.S. Attorney General to chill her speech, then

Petitioner would be entitled to $1 in nominal damages from Respondent Bednard and $1 in nominal damages from Respondent Chippewa Valley School District. Under *Uzuegbunam*, the Sixth Circuit could hold that one governmental official attempting to chill speech by seeking an investigation from another governmental official is not adverse action as a matter of law, but it cannot do so due to alleged lack of compensatory harm to Petitioner. Nominal damages are always available for constitutional violations.[15]

C. Indirect threats of prosecution as adverse action in this Court and the Courts of Appeals.

This Court has held that a reference to a prosecutor by another governing unit can violate the First Amendment. In *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), Rhode Island created an obscenity commission to review

15. On harm, the Sixth Circuit cited *Gordon v. Warren Consolidated Board of Education*, 706 F.2d 778 (6th Cir. 1983) for the proposition that: "When there is no objective chill to one's speech, allegations of a speculative or subjective harm do not establish a First Amendment retaliation claim." App.16a. That case concerned an undercover police officer at a school. It was dismissed largely based on *Laird v. Tatum*, 408 U.S. 1 (1972). Both of these cases stand for the proposition that general intelligence gathering by government does not chill First Amendment activity. Here, that would mean Petitioner could not bring suit against the Department of Justice or the Attorney General due to the broad October 4, 2021 policy. But, she is not challenging the policy in general or the fear that such a reporting program might one day apply to her, she is challenging the choice Respondents made to report her to the Department of Justice with the urging that she be subjected to criminal investigation. After all, what else could the DOJ do to "curb this behavior by these people?"

various materials for obscenity and to "recommend the prosecution of all violations" of the obscenity law. *Id.* at 60.

The commission would review material and then notify the publishers if that material was found to be objectionable. A letter would go to the publisher and that letter would include a reminder of the commission's duty "to recommend to the Attorney General prosecution of purveyors of obscenity." *Id.* at 62.

It was argued that the commission did "not regulate or suppress obscenity but simply exhorts booksellers and advises them of their legal rights." *Id.* at 67. This Court noted: "People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around, and [one publisher's] reaction [of recalling disputed material] . . . , was no exception to this general rule." *Id.* at 68.

This Court explained the "vice of the system":

> The Commission's operation is a form of effective state regulation superimposed upon the State's criminal regulation of obscenity and making such regulation largely unnecessary. In thus obviating the need to employ criminal sanctions, the State has at the same time eliminated the safeguards of the criminal process. Criminal sanctions may be applied only after a determination of obscenity has been made in a criminal trial hedged about with the procedural safeguards of the criminal process. The Commission's practice

> is in striking contrast, in that it provides no safeguards whatever against the suppression of nonobscene, and therefore constitutionally protected, matter. It is a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law.

Id. at 69-70.

In *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019), in the context of a ruling on standing, the Sixth Circuit considered the University of Michigan's "Bias Response Team," which was ostensibly created to assist the university in combatting harassing and bullying behavior. A student who filed a bias incident would be contacted by the team and the team would also seek to contact the alleged student engaging in bias. While the team had "no direct punitive authority" in that it could not "suspend a student or impose academic sanctions" it could "make referrals to police, [Office of Student Conflict Resolution], or other school resources such as counselling services." *Id*. at 763. The Sixth Circuit stated:

> The Response Team's ability to make referrals—*i.e.*, to inform OSCR or the police about reported conduct—is a real consequence that objectively chills speech. The referral itself does not punish a student—the referral is not, for example, a criminal conviction or expulsion. But the referral subjects students to processes which could *lead* to those punishments. The referral initiates the formal investigative process, which itself is chilling even if it does not result in a finding of responsibility or criminality. *See Bantam Books, Inc.*, 372 U.S.

> at 68, 83 S.Ct. 631. Furthermore, nothing in the record suggests that the Response Team may refer matters only if the reporting student assents. By instituting a mechanism that provides for referrals, even where the reporting student does not wish the matter to be referred, the University can subject individuals to consequences that they otherwise would not face.

Id. at 765.[16]

In *Okwedy v. Molinari*, 333 F.3d 339 (2nd Cir. 2003), the Second Circuit stated:

> We write here only to make clear that a public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights even if the public-official defendant lacks direct regulatory or decisionmaking authority over the plaintiff or a third party that facilitates the plaintiff's speech.

Id. at 340-41. Further, it stated:

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16. Here, Judge Clay and Stranch sought to distinguish *Schissel* as a facial and not an as-applied challenge and not as a question of what constitutes "adverse action" in a First Amendment retaliation context. App.18a. They did not discuss the general principle of chilling effect reports to a prosecutor has on First Amendment activity.

Should a writ of certiorari be granted, *Bantam Books* (as clear precedent of this Court) and *Speech First, Inc. v. Schlissel* (as clear precedent of the Sixth Circuit) would be the basis on which Petitioner would argue that qualified immunity would not apply.

> Thus, the fact that a public-official defendant lacks direct regulatory or decisionmaking authority over a plaintiff, or a third party that is publishing or otherwise disseminating the plaintiff's message, is not necessarily dispositive in a case such as this. What matters is the distinction between attempts to convince and attempts to coerce. A public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights, regardless of whether the threatened punishment comes in the form of the use (or, misuse) of the defendant's direct regulatory or decisionmaking authority over the plaintiff, or in some less-direct form.

Id. at 344.

In *Capp v. County of San Diego*, 940 F.3d 1046 (9th Cir. 2019), a father criticized social workers resulting in them allegedly persuading the mother to file a custody petition with the family court. The Ninth Circuit held that "The threat of losing custody of one's children is a severe consequence that would chill the average person from voicing criticism of official conduct." *Id.* at 1055.

But the Fifth Circuit has held directly to the contrary: "retaliatory criticisms, investigations, and false accusations that do not lead to some more tangible adverse action are not actionable under § 1983." *Colson v. Grohman*, 174 F.3d 498, 511 (5th Cir. 1999). See also, *Reitz v. Woods*, 85 F.4th 780, 790 (5th Cir. 2023) ("[W]e have held that being subjected to and defending oneself from an investigation while suffering its concomitant stress does not satisfy the injury requirement."

Thus, there is circuit court conflict on the question whether a governmental official referring a protected speaker to another governmental entity for an investigation constitutes an adverse action for purposes of a First Amendment retaliation claim.

The Fifth Circuit's rule should be rejected. It allows too much chilling effect to escape punishment. At the Sixth Circuit, Petitioner used the analogy of a roulette wheel. Would an individual want to risk a criminal prosecution if the wheel came up red? What if there was just an investigation that led to no charges and the speaker had to pay for an attorney? The governmental official's goal is to chill speech. Should we allow that if he or she is lucky enough to make a serious threat that does not cause harm? Should we allow it if a police officer threatens to shoot or beat a critic at an arrest as long as the officer does not do either? Some unrealized threats are sufficient to constitute adverse action. Turning over a speaker to a governmental agency that has indicated that it is willing to expend major resources to limit debate at school boards is sufficient.

It is a good possibility that the pettiness, toxicity, and vindictiveness of our current politics will make the answers to the threat question even more important. There is a circuit conflict, this case is a good vehicle for resolving it, and the First Amendment retaliation cause of action at issue is an essential cause of action to protect free speech rights.

RELIEF REQUESTED

For the reasons stated above, this Court should grant the writ of certiorari.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED SEPTEMBER 16, 2025

UNITED STATES COURT OF APPEALS
OR THE SIXTH CIRCUIT

No. 24-1842

SANDRA HERNDEN,

Plaintiff-Appellant,

v.

CHIPPEWA VALLEY SCHOOL DISTRICT, *et al.*,

Defendants-Appellees.

Filed September 16, 2025

OPINION

NOT RECOMMENDED FOR PUBLICATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Before: CLAY, KETHLEDGE, and STRANCH, Circuit Judges.

CLAY, J., delivered the opinion of the court in which STRANCH, J., concurred. KETHLEDGE, J. (pp. 15–17), delivered a separate opinion concurring in the judgment.

Appendix A

CLAY, Circuit Judge. Plaintiff Sandra Hernden brings this 42 U.S.C. § 1983 action and First Amendment retaliation claim against the Chippewa Valley School District and two of its board members, Frank Bednard and Elizabeth Pyden, for whom the district court granted summary judgment. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

Plaintiff Sandra Hernden was a police officer at the City of Harper Woods Police Department who had children attending school in the Chippewa Valley School District. Hernden was also a member of "Moms for Liberty,"[1] an organization of mothers who appeared at school board meetings to advocate for in-person schooling during the COVID-19 pandemic. Hernden Dep., R. 25-2, Page ID #351. Hernden attended these meetings at the Chippewa Valley School District and had "heated" interactions with members of the School Board, particularly Defendant Elizabeth Pyden, about the District's handling of the pandemic. Compl., R. 1, Page ID #4. Hernden also sent aggressive and politically charged emails to the Board about the efficacy of hybrid learning.[2]

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1. Defendants' brief describes "Moms for Liberty" as an "extremist" organization, according to the Southern Poverty Law Center. Appellees' Br., ECF No. 22, 6.

2. Because of the COVID-19 pandemic, many elementary and secondary schools transitioned to a hybrid learning format consisting of a mixture of virtual and in-person learning.

Pyden testified that Hernden "publicly defamed" her at board meetings and encouraged others to disparage her online, posting "hateful messages about [her] age, appearance, and family." Pyden Aff., R. 25-3, Page ID #384-85. Among other behaviors, Hernden revealed Pyden's personal information on online forums, such as her home address and phone number, which resulted in "occupied cars parked in front of [Pyden's] home," the receipt of "Nazi cartoons" in Pyden's mail, and "telephone calls and messages . . . indicating that [Pyden] should kill [herself]." *Id.* at 384. Hernden also sent messages to the Board and community demanding that "action" be taken against Pyden. *Id.* at 385.

On December 10, 2020, Pyden "exchanged several emails with [Hernden] regarding the global pandemic, face-to-face learning, and Board action related to such topics." *Id.* Hernden "proceeded to issue a series of personal attacks" against Pyden. *Id.* On December 11, 2020, this culminated in Pyden forwarding the email chain from her personal email to Chief Vince Smith, who was Hernden's then-supervisor at the Harper Woods Police Department ("Harper Woods" or "the Department"). The email read:

> Dear Chief Smith:
>
> I am writing with a concern regarding how one of your officers conducts herself in her own community. As you know, return to school has been a hotly contested issue, however, we must do what is best for the community at

> large. I have noticed that in fact your city hall has closed indefinitely to assist in stopping the community spread. As an elected official, I do expect criticism. I also expect people to disagree with me. However, I do not expect the level of disrespect, even after being asked to stop, that has been shown by one of your public safety officers, Sandra Hernden. As a public servant, more is expected. I do not believe that you would like anyone expressing this level of anger, disrespect and veiled racism in your community. I have attached the exchange below. There have also been calls into our meeting, although I do believe there may have been some connection issues. I am disappointed that this type of behavior has been repeatedly rewarded with service awards. While I do not expect you to take any adverse action, I do believe that it is important for you to know how one of your officers is conducting herself within the community and perhaps offer some guidance.
>
> Thank you for your attention to this matter. May you and your family have a blessed holiday season.
>
> Elizabeth Pyden

Pyden Email, R. 1-2, Page ID #16. As result of this email, Chief Smith spoke to Hernden and advised her that she would not be disciplined by the Police Department. While there had been a "brief" investigation due to Pyden's

email, it had not uncovered anything, and Hernden only became aware of it after being told that she did not violate any department policy. Hernden Dep., 25-2, Page ID #331. Hernden experienced no monetary or emotional damages because of the email. Admittedly, Hernden "was undeterred" by Pyden's email and "continued to advocate for a return to in-person learning." Appellant Br., ECF No. 16, 7.

On September 13, 2021, Hernden participated in public comment at a school board meeting. Defendant Frank Bednard, Board President and a retired police officer, observed that Hernden's demeanor was "much more serious than when normally addressing the Board," and that "[s]he seemed very angry and very agitated." Bednard Aff., R. 25-4, Page ID #389. Hernden's public comment "began with a history of the publication of Adolf Hitler's *Mein Kampf* and a description of how Nazi Germany labeled Jewish individuals with 'yellow badges.'" *Id.* Because these comments "went on for some time and appeared to be irrelevant to District matters, [Bednard] attempted to direct [Hernden] to explain how this commentary related to the District." *Id.* at Page ID #390. Hernden proceeded to "tell[] a story about a family member." *Id.* When Bednard again attempted to direct Hernden to address District matters, "she yelled several times in response that she was getting to her point." *Id.* Hernden then compared the Board's pandemic mask-policy to Nazi Germany. Bednard testified that, as a retired police officer with "30 years of experience and training in reading an individual's behavior," Hernden's "aggressive behavior shocked and scared [him]." *Id.*

Appendix A

On October 4, 2021, United States Attorney General Merrick Garland issued a memorandum to address threats against school administrators, board members, and other educators. Bednard viewed an ABC News report on the memorandum, "which reported that anyone could refer abusive, intimidating, or threatening behaviors at Board meetings to the Department of Justice ('DOJ')." *Id.* That same day, Hernden sent an email to the District with the subject line, "Special attention to Frank [Bednard]" with a link to a recent Sixth Circuit decision "concerning public commentary at school board meetings." *Id.* Hernden's email read: "Once again, law on parents [*sic*] side. Maybe a lil [*sic*] more due care and caution at the next meeting Frank. You know, when you let your hatred you have for me take hold and you interrupt me. 1st 2 were free . . . " Compl., R. 1, Page ID #8.

In light of Hernden's "escalating aggressive behavior at Board meetings," Bednard found this email threatening, and transmitted a copy of it to the DOJ on October 5, 2021. Bednard Aff., R. 25-4, Page ID #391. Bednard also sent the following message describing Hernden's conduct at board meetings:

> Hello DOJ,
>
> I appreciate your looking into these groups of people who bring such threats to anybody that stands in their way. The email I included below is from Sandra Hernden. This woman, Sandra Hernden, comes to every meeting to harass our board, administration, and community who

oppose her views. She is over dramatic, and refuses to listen to any direction I may give her about her inappropriate and threatening comments. Last week she compared the tattoos Nazi Germany gave Jewish people to identify them in WW2 to [the] Masking mandate of today (even though mask[s] are not mandated in our district). We understand that Sandra has no children in our schools, is not a resident of our district, and goes around to school board meetings throughout the tri county area to promote her agenda in any way that she can including threats and intimidation. She is part of a group called, "Mothers of Liberty" that attend our meetings. This group of people attend every meeting, and because their threats and demeanor are so intimidating, no community members who oppose their message will come to the meeting to speak because they are afraid of what this group would do to them for standing up to them.

Our school district has over 15,000 students. We know that they have not gained any traction as it is the same 10-15 people that show up every meeting to intimidate, threaten, and harass. Anything that could be done to curb this behavior by these people would be greatly appreciated by our board, administration, and our community.

Thank you!

Compl., R. 1-3, Page ID #26. Hernden was not aware of Bednard's communication with the DOJ until a friend later informed her about it. She further acknowledged that the DOJ took no action in response to Bednard's email and did not contact her in any manner. After the email was sent, Hernden continued to appear at school board meetings in October 2021 and April 2022.

On September 29, 2022, Plaintiff Hernden filed a First Amendment retaliation lawsuit against the District, Bednard, and Pyden ("Defendants") pursuant to 42 U.S.C. § 1983. Hernden viewed the emails of Pyden and Bednard as retaliatory actions meant to curb her speech at school board meetings. On March 27, 2023, Defendants filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(c), arguing that "Plaintiff made no factual allegations against the Board/District itself." Defs.'s Mot. to Dismiss, R. 17, Page ID #137. The district court granted Defendants' motion in part and denied it in part, holding that Pyden's email could not satisfy the requirements for municipal liability under *Monell v. Department of Social Services,* but that discovery was needed to ascertain whether the District was responsible for Bednard's email to the DOJ. 436 U.S. 658 (1978). Plaintiff and Defendants then filed opposing Motions for Summary Judgment. The district court granted Defendants' Motion in full and denied Plaintiff's Motion in full, holding that Plaintiff did not suffer an adverse action that would deter a person of ordinary firmness from engaging in protected speech. Because the district court found no constitutional violation, it did not discuss whether Defendants were entitled to qualified immunity. This appeal followed.

II. DISCUSSION

We review the district court's grant of summary judgment *de novo. Kubala v. Smith,* 984 F.3d 1132, 1137 (6th Cir. 2021) (quoting *Jones v. Clark Cnty.,* 959 F.3d 748, 756 (6th Cir. 2020)). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* (quoting Fed. R. Civ. P. 56(a)). Moreover, "[q]ualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd,* 563 U.S. 731, 735 (2011) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)).

A. Summary Judgment as to Defendant Pyden

Plaintiff Hernden argues that Pyden's email to Chief Smith, her supervisor, was an adverse action sufficient to "deter a person of ordinary firmness from engaging in conduct protected by the First Amendment." Appellant Br., ECF No. 16, 13. Hernden claims that it is irrelevant that she kept her job and suffered no compensatory damages as result of the email. She further states that although Pyden's email "expressly disclaims the desire that [Hernden] face an adverse employment action [as result of her speech at the school board meetings], a reasonable jury could nevertheless conclude that an adverse action was reasonably foreseeable." *Id.* at 17. To bolster this argument, Hernden cites Pyden's written

accusation that she was a "veiled racis[t]," and that this comment served to threaten her livelihood as a police officer following the recent death of George Floyd.[3] *Id.* at 18-19. Defendants argue that "mere complaints to a citizen's employer" do not constitute an adverse action, Appellees' Br., ECF No. 22, 21, and that Pyden was merely exercising her own First Amendment rights by revealing true information about Hernden's speech and conduct to her employer.

To succeed on her First Amendment retaliation claim, Hernden must establish the following three elements:

> (1) that [she] was engaged in a constitutionally protected activity; (2) that the defendant's adverse action caused [her] to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the adverse action was motivated at least in part as a response to the exercise of [her] constitutional rights.

Paige v. Coyner, 614 F.3d 273, 277 (6th Cir. 2010) (quoting *Bloch v. Ribar,* 156 F.3d 673, 678 (6th Cir. 1998)). There is no

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3. Plaintiff notes that George Floyd was killed on May 25, 2020, by three Minneapolis Police Officers. Appellant Br., ECF No. 16, 18-19. Floyd was an African American, and his death has often been characterized as a racially motivated instance of police brutality. *See id.* (citing *Three Former Minneapolis Police Officers Convicted of Federal Civil Rights Violations for Deathof George Floyd,* U.S. Department of Justice, (Feb. 24, 2022), https://www.justice.gov/archives/opa/pr/three-former-minneapolis-police-officers-convicted-federal-civil-rights-violations-death.).

doubt that Hernden's speech at the school board meetings was a constitutionally protected activity under element one of her claim. *Paige v. Coyner,* 614 F.3d 273, 280-81 (6th Cir. 2010). Whether Pyden's email constituted an adverse action or credible threat to Hernden's employment with the Department, as required to satisfy element two, is a closer issue. But we need not reach the second or third elements of Hernden's First Amendment retaliation claim with respect to Defendant Pyden, because under *Mackey v. Rising,* Pyden had no actual authority to speak for the Board in her communication to Chief Smith. 106 F.4th 552, 559 (6th Cir. 2024).

"An act is not attributable to a State unless it is traceable to the State's power or authority. Private action —no matter how 'official' it looks—lacks the necessary lineage." *Lindke v. Freed,* 601 U.S. 187, 198 (2024). In the First Amendment context, "'the controlling issue' [is] whether an official 'possessed state authority' to take the action 'and whether [they] purported to act under that authority' on the specific occasion." *Mackey,* 106 F.4th at 559 (quoting *Dean v. Byerly,* 354 F.3d 540, 553 (6th Cir. 2004)). A state official does not possess the actual authority to take a challenged action on behalf of the state unless that action "meaningfully relates to [their] 'governmental status' or the 'performance of [their] duties.'" *Id.* at 559 (quoting *Waters v. City of Morristown,* 242 F.3d 353, 359 (6th Cir. 2001)). In *Mackey,* we addressed this issue when the plaintiff, Shane Mackey, brought a § 1983 claim against City Commissioner, Jeff Rising, for violating his First Amendment rights after Rising made a phone call threatening to physically "hurt" Mackey if he did not remove a social media post. *Id.* at 554-55. We determined

that the alleged threat did not constitute the "type of authority" vested in City Commissioners such as Rising who perform mostly legislative duties, because "[u]nlike police officers, legislators generally lack the power to wield the State's monopoly on the use of force," meaning that "Rising lacked any power to make this type of threat on the City's behalf." *Id.* at 562.

Likewise, Hernden has not demonstrated how Pyden possessed any actual authority to speak on behalf of Chippewa Valley Schools when she wrote the email to Chief Smith complaining of Hernden's behavior. As a member of the Board, Pyden assists in policymaking on behalf of the school district but ostensibly has no authority or control over employment decisions being made at the Harper Woods Police Department. And Hernden points to no "statute, ordinance, regulation, custom, or usage" granting Pyden this power in her capacity as a state official. *Id.* at 559. The Board's official bylaws do not authorize individual Board members such as Pyden to speak for the Board except as it pertains to "public statements on school matters," and only on certain occasions. Policy Manual for Chippewa Valleys Schools, R. 24-9, Page ID #278 (specifying that individual Board members may only deliver these public statements "[f]rom time-to-time"). Pyden's private email to Chief Smith hardly qualifies as a "public statement." *Id.*

Furthermore, Pyden sent the email to Chief Smith using her *private email account* and did not advise the Board of her intent to send the email, and the Board "never ratified nor adopted" the email in any way. Pyden

Aff., R. 25-3, Page ID #386. Without any indication that Pyden was authorized to act as an official mouthpiece for the Board under these circumstances, she cannot simply "conjure the power of the State through [her] own efforts" as a private citizen. *Mackey,* 106 F.4th at 563. This ends the inquiry on Defendant Pyden.

B. Summary Judgment as to Defendant Bednard

Plaintiff Hernden also argues that Bednard's email referral to the DOJ was an adverse action because it placed her under "threat of a specific future harm." Appellant Br., ECF No. 16, 26 (citing *Speech First, Inc. v. Schlissel,* 939 F.3d 756, 764 (6th Cir. 2019)). In particular, she claims that the Attorney General's memorandum on prosecuting domestic terrorism caused her to "face[] a distinct and cognizable fear of an investigation by the DOJ," *id.* at 29, and that "[a] person of reasonable firmness would have been chilled by [Bednard's email to the DOJ] in light of the imminent exposure to criminal liability it created." *Id.* at 30. Defendants respond that Bednard's email, at most, caused a "subjective chilling" of Hernden's First Amendment rights and did not rise to the level of an adverse action. Appellees' Br., ECF No. 22, 24 (citing *Laird v. Tatum,* 408 U.S. 1 (1972)).

As an initial matter, Bednard's authority to speak for the Board is far more robust than Pyden's. The Board's official bylaws provide that Bednard, as Board President, always "functions as the official spokesperson for the Board," whereas "individual Board members" such as Pyden may *sometimes* "make public statements on school

matters." Policy Manual for Chippewa Valley Schools, R. 24-9, Page ID #278. Accordingly, Bednard was expressly empowered to speak on behalf of the Chippewa Valley Schools Board of Education when he emailed the DOJ about Hernden's disruptive behavior on October 5, 2021, and *Mackey*'s state action requirement is satisfied. 106 F.4th at 559.

Having established state action, we now move to the merits of Hernden's claim. For First Amendment retaliation purposes, an adverse action is one that "would chill or silence a person of ordinary firmness from future First Amendment activities." *Josephson v. Ganzel,* 115 F.4th 771, 787 (6th Cir. 2024) (quoting *Benison v. Ross,* 765 F.3d 649, 659 (6th Cir. 2014)). This analysis "must be tailored to the circumstances," and recognizes that public employees, such as police officers, "might have to endure more than the average citizen." *Fritz v. Charter Twp. of Comstock,* 592 F.3d 718, 724 (6th Cir. 2010). To be actionable, an adverse action must generate more than "de minimis negative consequences." *Kubala,* 984 F.3d at 1139. Inconsequential actions are thus "properly dismissed as a matter of law." *Wurzelbacher v. Jones-Kelley,* 675 F.3d 580, 584 (6th Cir. 2012); *see Mezibov v. Allen,* 411 F.3d 712, 721 (6th Cir. 2005) ("[S]ince § 1983 is a tort statute, we must be careful to ensure that real injury is involved, lest we 'trivialize the First Amendment' by sanctioning a retaliation claim even if it is unlikely that the exercise of First Amendment rights was actually deterred." (citing *Thaddeus-X v. Blatter,* 175 F.3d 378, 397 (6th Cir. 1999) (en banc))).

Traditionally, the term "adverse action" has arisen from the employment context, and refers to "discharge, demotions, refusal to hire, nonrenewal of contracts, and failure to promote." *Kubala,* 984 F.3d at 1140 (quoting *Thaddeus-X,* 175 F.3d at 396). An employer need not discharge an employee for them to show that an adverse action occurred. *Id.* at 1139. That said, "[m]ost of the relevant Supreme Court and Sixth Circuit cases concern actual retaliation, *not threats of retaliation,* and firings constitute the bulk of the cases." *Id.* at 1140 (emphasis added).

In some cases, "threats alone can constitute an adverse action if the threat is capable of deterring a person of ordinary firmness from engaging in protected [speech]." *Id.* (quoting *Hill v. Lappin,* 630 F.3d 468, 474 (6th Cir. 2010)). This includes "credible threat[s]" made to one's economic livelihood, "[s]ince few aspects of one's life are more important than gainful employment." *Fritz,* 592 F.3d at 728; *see Paige,* 614 F.3d at 281 ("Losing one's job and accompanying benefits is certainly severe enough to deter a person of ordinary firmness from speaking at public meetings." (citing *Harris v. Bornhorst,* 513 F.3d 503, 519 (6th Cir. 2008)). "[A] credible threat to the nature and existence of one's ongoing employment is of a similar character to the other recognized forms of adverse action —termination, refusal to hire, etc.—even if perpetrated by a third party who is not the employer." *Fritz,* 592 F.3d at 728.

Less commonly, an adverse action may also arise from conduct that creates a credible threat of criminal prosecution. While this nature of threat may "significantly heighten[] the risk of chilled expression," there must still be a specific objective harm. *Kareem v. Cuyahoga Cnty. Bd. of Elections,* 95 F.4th 1019, 1025 (6th Cir. 2024); *Schlissel,* 939 F.3d at 764. This means "something more than 'the individual's knowledge that a governmental agency was engaged in certain activities or . . . the individual's concomitant fear that . . . the agency might in the future take some other and additional action detrimental to that individual.'" *Schlissel,* 939 F.3d at 764 (quoting *Laird,* 408 U.S. at 11). When there is no objective chill to one's speech, allegations of a speculative or subjective harm do not establish a First Amendment retaliation claim. *Gordon v. Warren Consol. Bd. of Educ.,* 706 F.2d 778, 781 (6th Cir. 1983). It is likewise insufficient to allege "the mere existence, *without more,* of a governmental investigative and data-gathering activity." *Schlissel,* 939 F.3d at 764 (quoting *Morrison v. Bd. of Educ. of Boyd Cnty.,* 521 F.3d 602, 608 (6th Cir. 2008)). Governmental activity only constitutes an injury-in-fact when it is "regulatory, proscriptive, or compulsory in nature, and the complainant is either presently or prospectively subject to the regulations, proscriptions, or compulsions that he is challenging." *Id.* at 764-65 (quoting *Laird,* 408 U.S. at 11) (cleaned up).

For example, we found no adverse action in a state investigation where the plaintiff alleged no injury besides emotional damages. *Wurzelbacher,* 675 F.3d at 584. In *Wurzelbacher,* the plaintiff was a private citizen and Ohio

resident who made several public criticisms of former-President Barack Obama during his 2008 campaign. *Id.* at 581-82. These comments were widely publicized and led state officials to authorize a search of the plaintiff on several state databases; however, the plaintiff's complaint did not allege what information, if any, was actually uncovered. *Id.* at 584. Because the plaintiff suffered no specific or concrete injury, and "was not threatened with a continuing governmental investigation," *id.* at 584, we held that any adverse action was "'inconsequential' as a matter of law." *Id.* at 585 (quoting *McComas v. Bd. of Educ., Rock Hill Local Sch. Dist.,* 422 F. App'x 462, 469 (6th Cir. 2011)). This was true despite the plaintiff's allegations that he suffered "emotional distress, harassment, personal humiliation, and embarrassment." *Id.* at 584.

Here, by contrast, there is no evidence that Hernden was ever subjected to a governmental investigation. Her claim is instead rooted in her *fear of an investigation,* even though Defendant Bednard had no control over the actions of the DOJ and Hernden herself acknowledges that the DOJ did not attempt to contact or communicate with her in any way as result of Bednard's email referral. Hernden further admits that she is unaware of any action undertaken by the DOJ or if "anything ever came of [the] email." Hernden Dep., R. 25-2, Page ID #350. In her deposition, when Hernden was asked about "what impact, if any," the email had on her life, she answered: "None." *Id.*

Hernden has thus not shown that Bednard's email to the DOJ violated any clearly established law under these circumstances, where she does not allege even a single

tangible consequence of Bednard's email, and nothing else in the record plausibly suggests a threat of any future specific harm. *Wurzelbacher,* 675 F.3d at 584-85; *see also Mattox v. City of Forest Park,* 183 F.3d 515, 523 (6th Cir. 1999) (rejecting a First Amendment retaliation claim when the plaintiff failed to "concretize her personal injury").

Hernden nonetheless argues that Bednard's email subjected her "to the possibility of a prospective criminal investigation" in light of the Attorney General's recent memorandum urging school boards to report harassment to the DOJ, and that this fear of punishment objectively chilled her speech.[4] Appellant Br., ECF No. 16, 24. But Hernden has not explained how her speech could be chilled when she had no knowledge of Bednard's email to the DOJ until a friend later informed her of its existence. *See Wells v. Rice,* 692 F. Supp. 3d 735, 746 (E.D. Ky. 2023) ("An injury of which [a party is] not even aware cannot deter them and thus cannot support a [First Amendment] retaliation

4. Plaintiff Hernden seeks to rely on *Schlissel* to argue that reporting one's conduct to law enforcement objectively chills speech due to the fear of future punishment; however, *Schlissel* is distinguishable from the present matter. In *Schlissel,* we held that an advocacy organization had standing to sue the University of Michigan because the school's initiative for filing conduct reports ("bias incidents") included the ability to refer reported conduct to the authorities, thus chilling student speech. 939 F.3d at 765. But the plaintiffs in *Schlissel* brought a facial challenge to the University's definitions of harassment and bullying, 939 F.3d at 761, as opposed to Hernden's as-applied First Amendment challenge. *Schlissel* also does not concern a First Amendment retaliation claim, as Hernden alleges here, or what constitutes an adverse action in that limited context.

claim."). She has likewise not pointed us to any law that would have provided Bednard with "fair warning" that his email to the DOJ could be unconstitutional, *MacIntosh v. Clous,* 69 F.4th 309, 319 (6th Cir. 2023) (quoting *Hope v. Pelzer,* 536 U.S. 730, 741 (2002)), especially in light of the Attorney General's recent memorandum urging school board members, such as Bednard, to report instances of harassment.

Hernden further admits that, even after she learned of Bednard's email to the DOJ, "[s]he had no way to know whether this prospective criminal investigation could, or would, become actualized into a current investigation." Appellant Br., ECF No. 16, 25. Without the slightest indication that the DOJ was pursuing an investigation of Hernden or even considering doing so, her alleged fear of an investigation is too speculative. *Schlissel,* 939 F.3d at 764. She has not identified any clearly established law to suggest otherwise.

Accordingly, the district court did not err in granting Defendants' Motion for Summary Judgment.[5]

5. Because the record demonstrates no clearly established constitutional violation, the District is also entitled to summary judgment on Plaintiff Hernden's *Monell* claim. *See Blackmore v. Kalamazoo County,* 390 F.3d 890, 900 (6th Cir. 2004) ("A municipality or county cannot be liable under § 1983 absent an underlying constitutional violation. . . . ").

III. CONCLUSION

For the reasons set forth above, we **AFFIRM** the judgment of the district court.

KETHLEDGE, Circuit Judge, concurring in the judgment. I agree that the district court correctly granted summary judgment to the defendants. But my reasons for that conclusion differ in some respects from the majority's, so I concur only in the judgment.

As an initial matter, I think that a reasonable jury could find that the emails sent by board secretary Elizabeth Pyden and board president Frank Bednard, respectively, were adverse actions for purposes of her First Amendment claim. Pyden emailed Hernden's boss —Harper Woods Chief of Police Vince Smith—to say (of Hernden) that "I do not believe you would like anyone expressing this level of anger, disrespect and veiled racism in your community." True, Pyden added that, "[w]hile I do not expect you to take any adverse action, I do believe that it is important for you to know how one of your officers is conducting herself withing the community and perhaps offer some guidance." But the question whether to take that disclaimer at face value, in my view, was one for the jury to answer—particularly given the charge of "veiled racism," and that Pyden chose to send this email to—of all people—the one person with authority to fire Hernden. A reasonable jury could find that a person of "ordinary firmness" would have been chilled by news of that email. *See Wurzelbacher v. Jones-Kelley,* 675 F.3d 580, 583-84 (6th Cir. 2012).

The same is true of Bednard's email to the Attorney General Garland, just one day after he announced the FBI's willingness to investigate people who make threats at school-board meetings and to "prosecute them when

appropriate." Threatening behavior is exactly what Bednard complained about in his email; and Bednard ended the email by asking the Attorney General—the Nation's highest law-enforcement officer—to do "anything that could be done to curb [Hernden's] behavior." And just about the only thing that the Attorney General could have "done" in response to Bednard's request would have been to commence or threaten some kind of legal (possibly criminal) action against Hernden. Thus a jury could find that a person of ordinary firmness would be chilled by news of that email too.

Yet I agree with my colleagues that both defendants were entitled to summary judgment. Pyden patently was not a state actor when she sent her email to Chief Smith, because she lacked authority to speak for the Board. *See Mackey v. Rising,* 106 F.4th 552, 559 (6th Cir. 2024) (citation omitted). Hernden all but concedes the point. *See* Reply Br. 13; Oral Arg. 6:15-6:45. Pyden's email was personal, not official—which means she cannot be liable for it under § 1983. *Lindke v. Freed,* 601 U.S. 187, 199-201 (2024).

Meanwhile, Bednard is entitled to qualified immunity unless Hernden has shown that the existing caselaw would have made clear to Bednard that his email would violate her constitutional rights. *See Anderson v. Creighton,* 483 U.S. 635, 640 (1987). That email complained mostly about Hernden's allegedly threatening behavior, rather than her speech: he said Hernden had been "harass[ing] our board, administration and community who oppose her views," engaging in "threats and intimidation," and was

part of a group whose "behavior [is] so intimidating, no community members who oppose their message will come to the meeting to speak up because they are afraid of what this group would do to them." Bednard's complaints were not baseless: the day before, for example, Hernden had emailed him the following: "Maybe a lil more due care and caution at the next meeting Frank. You know, when you let your hatred you have for me take hold and you interrupt me. 1st two were free . . . " Even Hernden concedes that this email made a threat that aimed to change Bednard's behavior. True, Bednard's email also mentioned Hernden's speech—such as her comparison of the school board's policies to those of Nazi Germany. And that speech was protected by the First Amendment. *See National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977). But the bulk of Bednard's complaints were about her alleged threats, intimidation, and harassment—which the First Amendment would not protect. And Hernden has not identified any case that would have made clear to Bednard that this complaint, about this behavior, would have violated her First Amendment rights. I therefore agree with my colleagues that he was entitled to summary judgment as well.

Appendix A

UNITED STATES COURT OF APPEALS
OR THE SIXTH CIRCUIT

No. 24-1842

SANDRA HERNDEN,

Plaintiff-Appellant,

v.

CHIPPEWA VALLEY SCHOOL DISTRICT, *et al.*,

Defendants-Appellees.

Filed September 16, 2025

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit

Before: CLAY, KETHLEDGE, and STRANCH, Circuit Judges.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, FILED SEPTEMBER 30, 2024

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Case No. 22-cv-12313
HON. MARK A. GOLDSMITH

SANDRA HERNDEN,

Plaintiff,

v.

CHIPPEWA VALLEY SCHOOLS *et al.*,

Defendants.

JUDGMENT

Judgment is entered in accordance with the Opinion and Order entered on today's date. The case is closed.

KINIKIA ESSIX
CLERK OF THE COURT

By: s/Carolyn Ciesla
DEPUTY COURT CLERK

Appendix B

APPROVED:

s/Mark A. Goldsmith
MARK A. GOLDSMITH
UNITED STATES DISTRICT JUDGE

Dated: September 30, 2025

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, FILED SEPTEMBER 30, 2024

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Case No. 22-cv-12313
HON. MARK A. GOLDSMITH

SANDRA HERNDEN,

Plaintiff,

v.

CHIPPEWA VALLEY SCHOOLS *et al.*,

Defendants.

OPINION & ORDER

(1) DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (DKT. 24) AND (2) GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (DKT. 25)

This is a First Amendment retaliation action under 42 U.S.C. § 1983 brought by Plaintiff Sarah Hernden against the Chippewa Valley School District (the District); two members of the District's Board of Education (the Board); and Elizabeth Pyden and Frank Bednard (collectively, Defendants). Hernden alleges that Defendants unlawfully

retaliated against her for expressing her opposition to school policies by reporting concerns about Hernden's conduct to her then-supervisor at the Harper Woods police department and submitting a complaint to the U.S. Department of Justice (DOJ). Defendants argue that Hernden has not established that she suffered any adverse action because Defendants' conduct could not, as a matter of law, have a chilling effect on First Amendment activities. Both parties now move for summary judgment. For the reasons that follow, the Court grants Defendants' motion for summary judgment (Dkt. 25) and denies Plaintiff's motion for summary judgment (Dkt. 24).[1]

I. BACKGROUND

Hernden is a police officer and the mother of a child who formerly attended school in the Chippewa Valley School District. Pl. Dep. at 4, 6 (Dkt. 24-2). During the COVID-19 pandemic, the District implemented policies limiting in-person instruction. Compl. ¶ 16 (Dkt. 1). Hernden, as a member of the organization Moms for Liberty, Pl. Dep. at 30-31, opposed these policies while attending in-person and virtual Board meetings and individually contacting Board members. Compl. ¶ 16-18. These interactions were deemed "heated" by some participants, with Hernden on at least one occasion likening the District's mask policy to Nazi Germany. Compl. ¶ 18; Bednard Aff. ¶ 10 (Dkt. 25-4).

1. Because oral argument will not aid the Court's decisional process, the motion will be decided based on the parties' briefing. *See* E.D. Mich. LR 7.1(f)(2); Fed. R. Civ. P. 78(b). In addition to the motions, the briefing includes Plaintiff's response (Dkt. 29) and Defendants' response (Dkt. 28) and reply (Dkt. 30).

Appendix C

On December 10, 2020, Hernden emailed the Board an editorial published in the Chicago Tribune regarding remote learning. *See* Compl. at Ex. A (Dkt. 1-2). Defendant Elizabeth Pyden, a member of the Board, responded to Hernden's email by reiterating that the District's policies were implemented as safety precautions. *Id.* In response, Hernden argued that the policies were misguided and based on political, not medical, considerations, and that the Board was undermining public trust. *Id.*

The following day, Pyden forwarded this exchange between herself and Hernden to Hernden's then-supervisor at the police department, police chief Vance Smith. *Id.* In her e-mail to Smith, Pyden noted that she was "concern[ed] regarding how one of your officers [Hernden] conducts herself in her own community" and by the "level of anger, disrespect, and veiled racism" in Hernden's conduct. *Id.* Pyden continued, "[w]hile I do not expect you to take any adverse action, I do believe it is important for you to know how one of your officers is conducting herself within the community and perhaps offer some guidance." *Id.* Pyden noted that she sent the email unilaterally, without knowledge of the Board, and out of her own concern about Hernden's conduct. Pyden Aff. ¶¶ 14-21 (Dkt. 25-3).

In response to Pyden's email, Smith and deputy chief Ted Stager investigated Hernden's conduct and concluded that she was not in violation of any departmental rules. Compl. ¶¶ 20-21. Hernden was neither reprimanded, nor disciplined. Compl. ¶ 21. She acknowledges that she continued to attend Board meetings and engage in dialogue with the Board and its members. Compl. ¶ 22.

Appendix C

On October 4, 2021, Hernden once again emailed the Board, this time about a case decided by the Sixth Circuit related to First Amendment rights of parents at school board meetings. *See* Compl. at Ex. B (Dkt. 1-3). In addition to a link discussing the case, Hernden wrote: "Once again, law on parents (sic) side. Maybe a lil (sic) more due care and caution at the next meeting . . . . You know, when you let your (sic) hatred you have for me take hold and you interrupt me. 1st 2 were free . . . ." *Id.*

On the same day, the DOJ issued a memorandum informing school districts that the DOJ was "committed to using its authority and resources to discourage" "threats of violence or efforts to intimidate" school officials. Compl. at Ex. C (Dkt. 1-4). Bednard, the president of the Board, submitted a complaint to the DOJ, attaching Hernden's October 4th email and noting:

> I appreciate your looking into these groups of people who bring such threats to anybody that stands in their way. The email I included below is from Sandra Hernden. This woman, Sandra Hernden, comes to our every meeting to harass our board, administration, and community who oppose her views. . . . [Hernden] goes around to school board meetings throughout the tri county area to promote her agenda in any way she can including threats and intimidation. She is part of a group called, "Mothers for Liberty" that attend our meetings. This group of people attend every meeting, and because their threats and demeanor are so intimidating, no

> community members who oppose their message will come to the meeting to speak because they are afraid of what this group would do to them for standing up to them. Our school district has over 15,000 students. We know that they have not gained any traction as it is the same 10-15 people that show up at every meeting to intimidate, threaten, and harass. Anything that could be done to curb this behavior by these people would be greatly appreciated by our board, administration, and our community.

See Compl. at Ex. B.

Bednard shared his submitted complaint with the Board. *Id.* Hernden, however, was unaware that Bednard had submitted this complaint—she was only later made aware when a friend identified the complaint through a FOIA request. Pl. Dep. at 28. It remains unclear whether the DOJ investigated the matter, but Hernden was never contacted by law enforcement, nor was any action taken against her. *Id.* at 29.

Hernden filed this action, asserting claims under the First Amendment pursuant to 42 U.S.C. § 1983 against Pyden, Bednard, and the District. She alleged that Pyden's email to Smith and Bednard's email to the DOJ were unlawful retaliatory acts in response to her exercise of free speech. The Court previously rejected the District's motion to dismiss, 6/22/23 Op. & Order (Dkt. 23), but narrowed potential municipal liability against the District to the actions of Bednard, but not Pyden. *See id.*

at 8, 14. Before the Court are summary judgment motions filed by both Hernden and Defendants.

II. ANALYSIS[2]

To survive summary judgment on a First Amendment retaliation claim under § 1983, a plaintiff must show that: (i) plaintiff was engaged in constitutionally-protected speech; (ii) defendants took some adverse action that would "deter a person of ordinary firmness" from continuing to engage in protected speech; and (iii) defendants' adverse actions were "motivated" by the plaintiff's protected speech. *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc) (per curiam); *Fritz v. Charter Twp. of Comstock*, No. 1:07-cv-1254, 2010 U.S. Dist. LEXIS 71636, 2010 WL 2802453, at *3 (W.D. Mich. July 15, 2010), *aff'd*, 463 F. App'x 493 (6th Cir. 2012) ("In order to survive summary judgment on her § 1983 First Amendment retaliation claim, Plaintiff must present sufficient evidence to create a triable issue of fact as to each of the [three] elements.").

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2. In assessing whether a party is entitled to summary judgment, the Court applies the traditional summary judgment standard as articulated in *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007). A court will grant a motion for summary judgment where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). If the movant makes an initial showing that there is an absence of evidence to support the nonmoving party's case, the nonmovant can survive summary judgment only by coming forward with evidence showing there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1985).

Appendix C

Although there is some dispute among the parties as to whether Hernden's conduct is protected under the First Amendment and whether Defendants' actions were motivated by Hernden's protected speech, *see* Pl. Mot. for Summ. J. at 6-9, 12-14, 16-17, 18-19; Defs. Mot. for Summ. J. 23-24, the Court need not reach the merits of these issues. The primary disagreement—which is dispositive here—is whether, as a matter of law, there was an adverse action against Hernden that have would "deter[red] a person of ordinary firmness" from engaging in protected speech. *See* Pl. Mot. for Summ. J. at 9-12, 17-18; Defs. Mot. for Summ. J. at 13-20.

While an adverse action need not be "egregious" to survive summary judgment, "de minimis" threats or "inconsequential actions" are not sufficient, *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 822 (6th Cir. 2007) (punctuation modified), because "allowing constitutional redress for every minor harassment may serve to trivialize the First Amendment," *Mattox v. City of Forest Park*, 183 F.3d 515, 521 (6th Cir. 1999). This is an "objective inquiry," *Stolle v. Kent State Univ.*, 610 F. App'x 476, 483 (6th Cir. 2015), but the "analysis . . . must be tailored to the circumstances" of each case, *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 724 (6th Cir. 2010).

The Sixth Circuit has established that a person of "ordinary firmness" may be deterred from engaging in protected First Amendment activities—and has suffered adverse action—if there is a "credible threat" to their "economic livelihood," *Fritz*, 592 F.3d at 728, or if they

have to "endur[e] a criminal investigation" by the state and are subject to "direct injury or immediate threat of harm" because of the investigation, *Haggart v. City of Detroit*, No. 2:19-cv-13394, 2021 U.S. Dist. LEXIS 206888, 2021 WL 5040293, at *4 (E.D. Mich. Oct. 27, 2021); *Gordon v. Warren Consol. Bd. of Educ.*, 706 F.2d 778, 780-781 (6th Cir. 1983).

The parties debate the merits of (i) whether Pyden's e-mail to Hernden's supervisor posed a "credible threat" to her employment; and (ii) whether Bednard's complaint to the DOJ and the possibility of a criminal investigation qualifies as an adverse action. The Court addresses each issue in turn.

A. Pyden's E-mail to Hernden's Supervisor

With regards to the communication between Pyden and Hernden's supervisor at the police department, the parties dispute whether Pyden's e-mail was "mere criticism [that] is not actionable," Defs. Mot. for Summ. J. at 15, or whether it "threat[end]" Hernden's "economic livelihood" in a way that would deter a person of "ordinary firmness" in Hernden's situation from exercising their First Amendment rights, Pl. Mot. for Summ. J. at 11. Hernden argues that "the Sixth Circuit has already recognized" that simply "complain[ing] to a citizen's employer [is] sufficient" to qualify as an adverse action. Pl. Mot. for Summ. J. at 10. The cases Hernden relies on, however, suggest otherwise. *See* Pl. Mot. for Summ. J. at 10 (citing *Frtiz*, 592 F.3d 718 and *Paige v. Coyner*, 614 F.3d 273 (6th Cir. 2010)).

"The term 'adverse action' arose in the employment context and has traditionally referred to actions such as discharge, demotions, refusal to fire, nonrenewal of contracts, and failure to promote." *Fritz*, 592 F.3d at 724 (punctuation modified). Thus, courts have only deemed a defendant's complaint to a plaintiff's employer to be an adverse action in particular circumstances. One is if the defendant exerted "pressure" on the employer to take disciplinary action. *See id.* at 725. Another is where the defendant could "reasonably [have] foreseen" that the complaint would lead to discipline because the defendant exercised some "authority" or influence over the employer. *Paige*, 614 F.3d at 282 (holding that there was adverse action because it was "reasonably foreseeable" that the employer would take a complaint by a city official seriously to avoid "jeopardiz[ing] [a] working relationship with . . . County officials").

Here, Pyden's email to Hernden's supervisor at the police department did not rise to the level of threatening Hernden's economic livelihood. Pyden expressly noted in her email that she "d[id] not expect [the Department] to take any adverse action" against Hernden. *See* Compl. at Ex. A. Even if Pyden sought to insinuate otherwise, she could not reasonably have foreseen that the Department would take any action in response to her letter, given that she was writing in her capacity as a private citizen with no authority or influence over the actions of the Department. *See Anders v. Cuevas*, 984 F.3d 1166, 1177 (6th Cir. 2021) (holding that a town official's "badgering" of an employer, over whom the official did not "exercise[] any influence" and who could not affect the company's "opportunity to

receive business," did not reach the level of an adverse action); *Blick v. Ann Arbor Pub. Sch. Dist.*, 674 F. Supp. 3d 400, 432 (E.D. Mich. 2023) (holding that the mere filing of a police report or complaint "is not an adverse action . . . and Plaintiff has not provided any legal support to the contrary").

At most, the only concrete consequence of Pyden's e-mail that Hernden can point to is that the police department did carry out an investigation into whether Hernden's speech was in violation of Department policies "at a time when other parents had been terminated for their activism against COVID-19 school policies." Pl. Mot. for Summ. J. at 13.[3] However, an employer's internal investigation of an employee's conduct, without more, is insufficient to support a claim of adverse action. *See Stolle*, 610 F. App'x at 483-484 (finding no adverse action when a government official's complaint about a professor's letter prompted an internal investigation by the university, even when the professor was found to be "in violation of [university] policy" and "reprimand[ed]" for his conduct); *Sensabaugh v. Halliburton*, 937 F.3d 621, 628-629 (6th Cir. 2019) (holding that there was no adverse action when a football coach received a "Letter of Guidance" following an investigation into his social media posts by the school because the letter "did not itself impose any discipline or alter [Plaintiff's] employment conditions in any way").

Unlike the plaintiffs in *Stolle* and *Sensabaugh*, who at least were found to be in violation of school policy and

3. It is unclear from the briefing what Hernden means by "terminated."

were subject to "reprimand" from their supervisors, Hernden was fully exonerated of any wrongdoing and subject to no tangible employment action, not even a "reprimand." In fact, the confirmation from her supervisor that her speech did not conflict with any police department policies removed any shadow of doubt as to whether her employment was at risk. The fact that Hernden continued to be outspoken at Board meetings only further confirms that she never considered her speech to pose a threat to her employment. *See Whiting v. City of Athens*, 699 F. Supp. 3d 652, 660-661 (E.D. Tenn. 2023) (holding that although the inquiry is an objective one, "the fact that a plaintiff was not in fact deterred by the adverse action can support the conclusion that a person of ordinary firmness would not be deterred or chilled by the conduct"); *see also Wurzelbacher v. Jones-Kelley*, 675 F.3d 580, 585 (6th Cir. 2012) ("Our conclusion [that a person of ordinary firmness would not be deterred by the adverse conduct] is supported by the fact that [the plaintiff] was not deterred or chilled in the exercise of his First Amendment rights as the result of defendants' wrongful conduct.").

In light of these foregoing reasons, Hernden can hardly claim that Pyden's e-mail threatened her "economic livelihood" or that a reasonable person in her situation would have restrained the exercise of their free speech right—especially when she herself did not feel compelled to do so. Pyden's e-mail was nothing more than a "minor harassment" towards Hernden's free speech rights and such de minimis allegations do not rise to the level of a First Amendment retaliation claim. *Mattox*, 183 F.3d at 521.

B. Bednard's Complaint to the DOJ

With regards to Bednard's complaint submitted to the DOJ, Hernden argues that "[t]his Court has repeatedly held that criminal investigations will deter a person of ordinary firmness from continuing to engage in protected First Amendment [a]ctivity." Pl. Mot. for Summ. J. at 17. However, as Defendants rightly point out, Hernden "only cites to case law where an investigation was *actually* conducted." Defs.' Resp. to Pl. Mot. for Summ. J. at 3 (citing *Raboczkay v. City of Taylor*, No. 19-12144, 2020 U.S. Dist. LEXIS 65945, 2020 WL 1873327, at *4 (E.D. Mich. Apr. 15, 2020), which found an adverse action supporting a retaliation claim when defendants' "defamatory letters" instigated a criminal investigation lasting nearly four months and where the plaintiff was "suspended pending the outcome" of the investigation).

The prerequisite that an investigation take place was clarified in *Laird v. Tatum*, 408 U.S. 1, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972). There, the Supreme Court instructed that a plaintiff can only allege a "deterrent[] or 'chilling'" effect on speech from a criminal or government-sanctioned investigation if they can identify "specific present objective harm or a threat of a specific future harm" stemming from an "exercise of governmental power that [is] regulatory, proscriptive, or compulsory in nature, and [where] the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging." *Id.* at 11, 14. A plaintiff who is forced to "endur[e] a[n] [actual] criminal investigation" and is subject to an "immediate threat of harm" has suffered

an adverse action, see *Haggart*, 2021 U.S. Dist. LEXIS 206888, 2021 WL 5040293, at *4.

But a plaintiff claiming injury from the possibility of being subject to a hypothetical or potential investigation has not suffered an adverse action, especially if no such investigation materializes or the investigation is "inconsequential" for the plaintiff. *See Wurzelbacher*, 675 F.3d at 582-585 (finding no adverse action when a plaintiff was subject to an inappropriate, but "inconsequential," investigation by a state agency because he suffered "no threat to [his] economic livelihood," no "search or seizure of property" and no "public disclosure of intimate or embarrassing information"); *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 374-376 (6th Cir. 2011) (holding that "the mere presence of an intelligence data-gathering activity" that the "[p]laintiffs, or others," were likely not aware of and that did not plausibly affect their conduct could not "give rise to constitutional liability") (punctuation modified).

Hernden argues that she suffered adverse action because Bernden's letter could have exposed her to an investigation by the DOJ and the threat of such an investigation alone would compel a person of "ordinary firmness" from participating in constitutionally-protected speech. Pl. Mot. for Summ. J. at 17. Yet Hernden does not and cannot explain how Bednard's complaint would plausibly have compelled her to alter her conduct when she was not even aware that a complaint had been filed in the first place. *See Wells v. Rice*, 692 F. Supp. 3d 735, 746 (E.D. Ky. 2023) ("An injury of which [a party is] not even aware

cannot deter them and thus cannot support a retaliation claim."). Even when made aware of the complaint through a friend, there was no indication that any investigation would materialize because, as with Pyden's relationship vis-à-vis the police department, Bednard had no influence over the DOJ's discretionary choices. *See* Defs.' Resp. to Pl. Mot. for Summ. J. at 3-4.

And, as far as the record suggests, no investigation did materialize. Defs. Mot. for Summ. J. at 8 ("Plaintiff admitted that the DOJ has not taken any action or contacted her in any manner."). In fact, Hernden has only expressed a "subjective fear" of a hypothetical federal investigation, but this is insufficient to meet the burden in *Laird* of a "specific" and "objective harm" from government action. *Gordon*, 706 F.2d at 781.

C. *Monell*

Because the Court finds no constitutional violation, the District is also entitled to summary judgment on Hernden's *Monell* claim. *See Blackmore v. Kalamazoo Cnty.*, 390 F.3d 890, 900 (6th Cir. 2004) ("A municipality or county cannot be liable under § 1983 absent an underlying constitutional violation . . . .").

III. CONCLUSION

For the reasons explained above, the Court grants the Defendants' motion for summary judgment (Dkt. 25) and denies Hernden's motion for summary judgment (Dkt. 24).

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, FILED JUNE 22, 2023

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Case No. 22-cv-12313
HON. MARK A. GOLDSMITH

SANDRA HERNDEN,

Plaintiff,

v.

CHIPPEWA VALLEY SCHOOLS, *et al.*,

Defendants.

OPINION & ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS (DKT. 17)

Before the Court is the motion to dismiss filed by school district Chippewa Valley Schools (Dkt. 17).[1] The

1. Hernden named as Defendant the Chippewa Valley Schools Board of Education; however, the District responds on behalf of the Board, asserting that, as a matter of state law, "a school board, as opposed to a school district, is not a corporate body which may sue or be sued." Mot. at 5 (quoting *Carlson v. N. Dearborn Heights Bd. of Educ.*, 157 Mich. App. 653, 403 N.W.2d 598, 605 (Mich. Ct. App. 1987)). Hernden does not dispute the District's assertion. Because

District seeks to dismiss Plaintiff Sandra Hernden's claims of municipal liability based on the alleged First Amendment violations of two school board members. For the reasons that follow, the Court grants the District's motion in part and denies the District's motion in part.[2]

I. BACKGROUND

Hernden alleges that she is a police officer and the mother of a child who was educated in the Chippewa Valley school system in Clinton Township, Michigan. *See* Compl. ¶ 14 (Dkt. 1). The Board allegedly implemented policies that limited in-person instruction during the COVID pandemic, and Hernden expressed her opposition to these policies by contacting members of the Board via Zoom, email, and in-person Board meetings. *Id.* ¶¶ 16-18, 22.

On December 11, 2020, Defendant Elizabeth Pyden—a member of the Board serving as its secretary—allegedly forwarded a series of emails between Hernden and Pyden to Hernden's "then-supervisor, challenging Plaintiff's

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Hernden does not dispute the District's contention that the Board is not itself a proper party, the Court agrees that the proper entity to be subject to this suit is the District, not the Board. The District does not seek dismissal on this basis; rather, it notes that it was "inappropriate[]" for Hernden to sue the Board, and it captions its motion with the District as the "correctly designated" party. *Id.*

2. Because oral argument will not aid the Court's decisional process, the motions will be decided based on the parties' briefing. *See* E.D. Mich. LR 7.1(f)(2); Fed. R. Civ. P. 78(b). In addition to the District's motion, the briefing includes Hernden's response (Dkt. 19) and the District's reply (Dkt. 20).

conduct as unbecoming of a police officer." *Id.* ¶¶ 5, 19 (citing Pyden Email (Dkt. 1-2) (reflecting that Pyden forwarded email between herself and Hernden to Vincent Smith, director for Harper Woods Department of Public Safety, on December 11, 2020)). Hernden submits that her supervisor then commenced an investigation to determine whether Hernden had violated any departmental rules, though Hernden was not disciplined. *Id.* ¶ 20.

In a subsequent email to the Board, Hernden allegedly "cautioned" the Board against "interrupting her public comments" and suggested that doing so violated the First Amendment. *Id.* ¶ 22. In Hernden's view, this email constituted "an implied threat of legal action against the Board and/or its individual members for perceived violations of Plaintiff's First Amendment rights during public comments at the Board's public meetings." *Id.* ¶ 51.

Hernden alleges that Defendant Frank Bednard—member and president of the Board—then forwarded Hernden's email to the United States Department of Justice (DOJ) with a complaint about her behavior. *Id.* ¶¶ 5, 23-24 (citing Bednard Email (Dkt. 1-3)). Bednard also informed the other members of the Board about his communication with the DOJ. *Id.* ¶ 23. The email from Bednard reflects that, on October 5, 2021, Bednard wrote an email addressed to "DOJ" that contained the following assertions, and then shared this communication with the Board members listserv:

> I appreciate your looking into these groups of people who bring such threats to anybody that

> stands in their way. The email I included below is from Sandra Hernden. This woman, Sandra Hernden, comes to every meeting to harass our board, administration, and community. . . .
>
> We know that [Hernden and the group "Mothers of Liberty"] have not gained any traction as it is the same 10-15 people that show up every meeting to intimidate, threaten, and harass. Anything that could be done to curb this behavior by these people would be greatly appreciated by our board, administration, and our community.

Bednard Email at PageID.26. Bednard included his title under his signature: "President, Chippewa Valley Schools Board of Education." *Id.* Hernden now alleges:

> Defendant Bednard's referral [to the DOJ] was an official act of the Board taken under color of law. Defendant Bednard's e-mail acknowledging the referral was sent to the Board as a whole, and it reflects joint action by each of its members. This e-mail reflects a collective decision of the Board, as well as Defendant Bednard individually.

Compl. ¶ 60.

Hernden brings claims under the First Amendment pursuant to 42 U.S.C. § 1983 against Pyden, Bednard, and the District for their alleged acts of retaliation—i.e.,

Pyden's email to Smith and Bednard's email to the DOJ—in response to Hernden's exercise of her free speech. *Id.* ¶¶ 26-62. Now before the Court is the District's motion to dismiss, which argues that Hernden cannot establish municipal liability against the District under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

II. ANALYSIS[3]

"[M]unicipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986) (finding that county was liable under *Monell* where county prosecutor directed sheriffs' actions that violated Fourth Amendment).

In the District's view, "[c]onspicuously absent from Plaintiff's Complaint . . . is any allegation that the Board of Education or the School District as an entity retaliated

3. To survive a motion to dismiss, a plaintiff must allege "facts that state a claim to relief that is plausible on its face and that, if accepted as true, are sufficient to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). The Court is required to "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). The defendant has the burden of showing that the plaintiff has failed to state a claim for relief. *Id.*

against Plaintiff in any manner." Mot. at 8.[4] The parties debate the merits of two theories under which the District is potentially liable for the retaliatory acts alleged by Hernden: (i) Bednard's email to the DOJ constituted official Board policy, and (ii) the Board maintained a policy of inaction toward First Amendment violations.[5]

A. Whether Hernden Plausibly Alleged that Bednard Email Was Board's Official Policy

A "local governing bod[y] . . . may be sued for having caused a constitutional tort through 'a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.'" *Adkins v. Bd. of Educ. of Magoffin Cnty., Ky.*, 982 F.2d 952, 957 (6th Cir. 1993) (quoting *Monell*, 436 U.S. at 690). The

4. The District states that Hernden will not be able to establish any underlying constitutional violations taken by the board members, but the motion to dismiss does not present arguments that Hernden's allegations are insufficient to establish that Pyder and Bednard violated the First Amendment; rather, the District argues that, "[a]ssuming Plaintiff could establish" that Pyder and Bednard did so, Hernden's allegations remain insufficient to establish liability for the Board or District. Mot. at 12.

5. Though the District asserts that the Board is not properly named as Defendant as a matter of state law, *see* Br. in Supp. Mot. at 5, the District also acknowledges that the Board is capable of taking official actions that bind the District for *Monell* purposes, *id.* at 8, 13-14. The Court, therefore, considers the parties' arguments as to whether Hernden's allegations suffice to maintain *Monell* liability based on actions of the Board—and if they do, then the Court finds that those allegations suffice to maintain *Monell* liability against the District.

"critical question" in this analysis is "whether the person committing the act did so pursuant to official policy." *Id.* "[O]nly local officials who have final policymaking authority may subject the local governing body to § 1983 liability, and whether an official has such final authority is a question of state law." *Id.* (punctuation modified).

Hernden's complaint presents Bednard's act of sending an email to the DOJ as an official decision enacted by the Board. *See* Compl. ¶ 60. The District argues that there could not have been any such final decision made here because, as a matter of Michigan law, school boards "only act through public meetings," and their "actions can only be accomplished by a majority of the Board by passing a resolution." Mot. at 8 (citing Mich. Comp. L. § 380.1201 ("The business that the board of a school district is authorized to perform shall be conducted at a public meeting of the board held in compliance with the open meetings act. . . . An act of the board is not valid unless the act is authorized at a meeting by a majority vote of the members elected or appointed to and serving on the board and a proper record is made of the vote.")). The act referenced in § 380.1201—the Michigan Open Meetings Act (OMA), Mich. Comp. L. 15.261 *et seq.*—requires that "[a]ll decisions of a public body must be made at a meeting open to the public." Mich. Comp. Laws § 15.263(2).

The District asserts that "no individual board member can bind the School District or promulgate Policy"; rather, "[i]t takes a quorum and a majority vote, which is then memorialized in minutes or a resolution." Mot. at 13 (citing *Tavener v. Elk Rapids Rural Agr. Sch. Dist.*, 341 Mich.

244, 67 N.W.2d 136, 139 (Mich. 1954)) (finding in favor of architect's successor in contractual dispute with school board over fees due based in part on board minutes, explaining: "Defendant [school board] speaks only through its minutes and resolutions. We have repeatedly held that where records are required to be kept, as they are by the defendant pursuant to [state law], their import cannot be altered or supplemented by parol testimony."). The District concludes that the attribution of statements made by one member to an entire organization "is not how legislative bodies function." Br. in Supp. Mot. at 12.

Hernden responds that—even if doing so is illegal—school boards can undertake official acts outside of public meetings. Br. in Supp. Resp. at 6. She submits that public bodies in Michigan must hold an open meeting to make a "decision" under the OMA. *Id.*[6] In Hernden's view, public bodies can make "decisions" under the OMA even if they do not hold formal, open meetings. *Id.* at 6-8 (citing *Booth Newspapers, Inc. v. Univ. of Mich. Bd. of Regents*, 444 Mich. 211, 507 N.W.2d 422, 429-430 (Mich. 1993) (finding that use of subcommittee meetings to narrow list of candidates for university president "must be considered closed session decisions under the OMA" violative of the act, and rejecting argument that "open meetings are only required when 'formal' voting occurs" because "the OMA's plain meaning clearly applies to 'all decisions' by public bodies"); *Nicholas v. Meridian Charter Twp. Bd.*,

6. *See also* Mich. Comp. Laws § 15.262(d) (defining "decision" as "a determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill, or measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy").

239 Mich. App. 525, 609 N.W.2d 574, 578 (Mich. Ct. App. 2000) (explaining that township committee meetings were subject to OMA, stating: "When a quorum of the members of a public body meet to consider and discuss public business, it is a 'meeting' under [the OMA . . . .] Thus, if members of a public body gather, a quorum being present, for the purpose of deliberating, the meeting is subject to the provisions of the OMA even if there is no intention that the deliberations will lead to the rendering of a decision on that occasion."), *abrogated on other grounds by Speicher v. Columbia Twp. Bd. of Trustees*, 497 Mich. 125, 860 N.W.2d 51 (Mich. 2014)). Hernden concludes that, "when a quorum of board members deliberates on a matter of public policy, and then acts based on those deliberations, they have nevertheless reached a 'decision.'" *Id.* at 7.

The Court agrees with Hernden that the District cannot escape allegations that the Board made a final decision potentially subjecting it to *Monell* liability merely because there is no vote or resolution on record. Under Michigan law, a local governing body like the Board can reach an official "decision" even if does not follow prescribed procedures. *See Booth*, 507 N.W.2d at 429-430; *Nicholas*, 609 N.W.2d at 578. The District's case law—demonstrating that courts rely on resolutions to determine the terms of contracts executed by governing bodies—does not contradict this understanding. *See Tavener*, 67 N.W.2d at 139.

The "critical question" is whether Hernden has plausibly alleged that Bednard's act of emailing the DOJ constituted "official policy" made by "local officials who have final policymaking authority," *Adkins*, 982 F.2d at

957 (punctuation modified), such that the Board made "a deliberate choice to follow a course of action," *Pembaur*, 475 U.S. at 483.

Hernden alleges that Bednard's email "was an official act of the Board" that "reflects joint action by each of its members" and "reflects a collective decision of the Board." Compl. ¶ 60. To support the plausibility of this inference, Hernden notes that (i) her "initial email"—the one ultimately forwarded to the DOJ—was sent to "the entire Board," not Bednard alone; (ii) Bednard subsequently advised the Board that he had forwarded Plaintiff's email to the DOJ; and (iii) Bednard's email to the DOJ uses the plural "we" and "our" and concludes by stating that a DOJ response would be "*greatly appreciated by our board*, administration, and community." Br. in Supp. Resp. at 8-9 (quoting Bednard Email at PageID.26) (emphasis in Br. in Supp. Resp.). Hernden concludes that Bednard was speaking on behalf of the Board in his official capacity. *Id.* at 9 (citing *Hindel v. Husted*, 875 F.3d 344, 347 (6th Cir. 2017) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.")).

Also supportive of Hernden's theory is that, in his email to the DOJ, Bednard identified himself as president of the Board. *See* Bednard Email at PageID.26.

The District considers the allegation implausible that the Board jointly agreed for Bednard to email the DOJ, *see* Mot. at 9, 13-14; Reply at 1-2; however, the District makes no attempt to weaken the allegations identified by Hernden in support of her inference. The Court finds

it plausible that—based on Bednard (i) telling the DOJ that its assistance would be appreciated by "our board," (ii) speaking in the first-person plural voice, (iii) signing the email as the Board's president, and (iv) sharing the email with the Board after he sent it—the email "reflects a collective decision of the Board." Compl. ¶ 60. These allegations suffice to maintain a claim against the District at the pleadings stage.[7]

The Court denies the District's motion to dismiss on this ground and finds that Hernden has a surviving *Monell* claim based on Bednard's email alleging collective Board action.

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7. Similar allegations have withstood a motion to dismiss. *See Williams v. Lawrence Cty. Career & Tech. Ctr.*, No. cv-17-620, 2017 U.S. Dist. LEXIS 177498, 2017 WL 4842549, at *10 (W.D. Pa. Oct. 26, 2017) (denying motion to dismiss municipal liability claim against career and technical center allegedly controlled by organization comprised of representatives of school districts because it was "plausible that representatives from each of the Defendant School Districts were delegated authority to act on behalf of the School Districts" and "plausible that the decisions of the representatives and the bases for them were ratified by the School Districts"). Similar claims have also withstood summary judgment motions. *See Ritchie v. Coldwater Cmty. Sch.*, 947 F. Supp. 2d 791, 810-811 (W.D. Mich. 2013) (denying summary judgment to school board on First Amendment claim based on board president's purported policy of "cutting off" speech where president "was responsible for running School Board meetings, including applying School Board policies and rules during meetings," which might allow reasonable jury to conclude his acts "constituted School Board policy"); *Rodrigues v. Vill. of Larchmont, N.Y.*, 608 F. Supp. 467, 476 (S.D.N.Y. 1985) (denying summary judgment to village based on "joint edicts or acts" of board of zoning appeals that "may fairly be said to represent official policy").

B. Whether Hernden Plausibly Alleged that Board Had Custom of Failing to Act in Response to First Amendment Violations

The parties also debate whether the Board had a custom of failing to act in response to First Amendment violations—i.e., whether the Board had "a custom of tolerance or acquiescence of federal violations." *Winkler v. Madison Cnty.*, 893 F.3d 877, 901 (6th Cir. 2018) (punctuation modified). This question determines whether there is municipal liability based on only Bednard's email, or on Pyden's email, too. "To state a municipal liability claim under an 'inaction' theory, [Hernden] must establish":

> (1) the existence of a clear and persistent pattern of [First Amendment violations] by [Board members];
>
> (2) notice or constructive notice on the part of the School Board;
>
> (3) the School Board's tacit approval of the unconstitutional conduct, such that their deliberate indifference in their failure to act can be said to amount to an official policy of inaction; and
>
> (4) that the School Board's custom was the "moving force" or direct causal link in the constitutional deprivation.

Appendix D

Doe v. Claiborne Cnty., Tenn. By & Through Claiborne Cnty. Bd. of Educ., 103 F.3d 495, 508 (6th Cir. 1996) (affirming grant of summary judgment to defendant school board based on alleged "failure to act" in response to allegations of teacher sexually abusing students because the evidence did not show "that the School Board, as an official policymaking body, had a 'custom' that reflected a deliberate, intentional indifference to the sexual abuse of its students," even if "board members, individually, might have been recklessly passive in the performance of their duties," explaining: "Their failure independently to investigate further is simply not 'board action' and certainly does not amount to a custom on which constitutional tort liability may be affixed.").

"A 'custom' for purposes of *Monell* liability must 'be so permanent and well settled as to constitute a custom or usage with the force of law.'" *Id.* at 507 (quoting *Monell*, 436 U.S. at 691). The plaintiff must plausibly allege that "the need to act is so obvious that the School Board's 'conscious' decision not to act can be said to amount to a 'policy' of deliberate indifference to [the plaintiff's] constitutional rights." *Id.* at 508.

The District argues that Hernden has not alleged municipal liability on the basis of a school board policy or custom at all. *See* Mot. at 14-17 (citing *Claiborne*, 103 F.3d at 508). Hernden responds that the Board is liable under *Monell* for "permitting an ongoing custom of allowing Board members to retaliate against members of the public

for speaking messages with which they disagree." Br. in Supp. Resp. at 10.[8]

Hernden argues that the Board knew about, but failed to correct, the unconstitutional actions of Pyden and Bednard. Hernden submits that the Board had knowledge of Pyden's email to Hernden's supervisor—based on the fact that Hernden had sent earlier emails to the entire Board complaining about Pyden—and yet "the Board took no adverse action against Defendant Pyden for her actions." Br. in Supp. Resp. at 11-12; *see also id.* at 12 (arguing that the Board "appears to have done nothing to remedy the issue or prevent similar breaches moving forward"). Further, given that "the Board does not appear to have taken action against Defendant Bednard for [his] constitutional violation," Hernden argues that "[a]t best, this demonstrates the Board acquiesced to Defendant Bednard's conduct; at worst, it represents an endorsement of it." *Id.* at 13-14. Hernden also notes that Hernden's

8. The cases cited by Hernden in support of this general proposition featured distinguishable issues that do not indicate that *Monell* liability is appropriate in this case. *See* Br. in Supp. Resp. at 10 (citing *Barrow v. City of Hillview, Ky.*, 775 F. App'x 801, 815 (6th Cir. 2019) (reversing grant of summary judgment to city on retaliation claim where district court applied standard for *Monell* theory of "existence of an illegal official policy" though pleadings asserted *Monell* theory that "an official with final decision making authority ratified illegal actions") (punctuation modified); *Haverstick Enterprises, Inc. v. Fin. Fed. Credit, Inc.*, 803 F. Supp. 1251, 1256 (E.D. Mich. 1992), *aff'd*, 32 F.3d 989 (6th Cir. 1994) (dismissing municipal defendant where plaintiffs "made merely conclusory allegations that the City of Romulus was grossly negligent in failing to train, supervise, and discipline its police")).

"communications with the Board were related to a matter of public interest"—i.e., COVID policy. *Id.*

The District responds that the Board as a whole has no legal obligation to respond to the comments made by a single member, who retains individual rights under the First Amendment. Reply at 3. The District also cites case law to argue that officials are not liable under § 1983 for failing to act in response to an alleged violation.[9] The District concludes that "after-the-fact approval of the course of action, which did not itself cause or continue a harm against the plaintiff, is insufficient to establish a *Monell* claim" because such an outcome would effectively

9. *See* Reply at 3-4 (citing *King v. Zamiara*, No. 4:02-cv-141, 2009 U.S. Dist. LEXIS 34084, 2009 WL 1067317, at *2 (W.D. Mich. Apr. 21, 2009) (explaining that "an official is not subject to supervisory liability for mere failure to act, even where that failure to act includes failure remedy the ongoing effects of a constitutional violation" and granting summary judgment to official where evidence showed he "was aware of Plaintiff's circumstances but he did not remedy them," which "conduct falls squarely outside the perimeter of § 1983 supervisory liability"); *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999) (finding that claims of supervising officials' denial of administrative grievances, "failure to remedy the alleged retaliatory behavior," and "failure to intervene" were insufficient to allege § 1983 liability because there was "no allegation that any of these defendants directly participated, encouraged, authorized or acquiesced in the claimed retaliatory acts"); *Lowe v. Prison Health Servs.*, No. 13-10058, 2013 U.S. Dist. LEXIS 185141, 2014 WL 584944, at *6 (E.D. Mich. Feb. 14, 2014) (granting summary judgment, explaining: "Supervisors are not liable under § 1983 merely because they are aware of an alleged violation and fail to act—this holds even if the omission is the failure to remedy the ongoing effects of a constitutional violation.") (punctuation modified)).

make the [District] liable on the basis of *respondeat superior*, which is specifically prohibited by *Monell*." Reply at 4 (quoting *Spencer v. City of Hendersonville*, 487 F. Supp. 3d 661, 694 (M.D. Tenn. 2020), *aff'd sub nom. Spencer v. City of Hendersonville TN*, No. 20-6168, 2021 U.S. App. LEXIS 30313, 2021 WL 8016828 (6th Cir. Oct. 8, 2021) (punctuation modified).

To the extent that Hernden seeks to attach liability to the District based on Pyden's alleged unconstitutional act, Hernden fails to establish *Monell* liability for multiple reasons. Her complaint does not explicitly allege any "policy" or "custom" of Board inaction at all; where Hernden's complaint discusses "policy," she refers to the Board's policies related to COVID. *See, e.g.*, Compl. ¶ 27. This failure merits dismissal on its own. *See, e.g., Armstrong v. U.S. Bank*, No. C-1-02-701, 2005 U.S. Dist. LEXIS 39186, 2005 WL 1705023, at *6 (S.D. Ohio July 20, 2005) (dismissing *Monell* claim brought on inaction theory where plaintiff "ma[de] no allegation explaining what the City's alleged policy [was]").

Hernden's complaint also does not allege that the Board had any knowledge of Pyden's email to Hernden's supervisor, nor does she plead facts that plausibly allow for that inference. Hernden alleges that Pyden individually emailed Hernden's supervisor. Compl. ¶¶ 19, 35. Hernden also identifies emails that Hernden exchanged with Pyden prior to Pyden's email to Hernden's supervisor, but she does not indicate that other Board members had any involvement in those exchanges, and no other Board members were copied on the latest thread ultimately

forwarded to Hernden's supervisor. *Id.* ¶¶ 19, 33; Pyden Email at PageID.17-20. Hernden, therefore, has not alleged that the Board was on notice of Pyden's email to Hernden's supervisor. *See Claiborne*, 103 F.3d at 508; *Thorpe v. Breathitt Cnty. Bd. of Educ.*, 8 F. Supp. 3d 932, 938-939 (E.D. Ky. 2014) (granting summary judgment to school board on claim of indifference to sexual abuse under inaction theory where plaintiff "failed to show that the Board *itself* [was] the wrongdoer" and did "not put forth any evidence to show that the Board itself was on notice of [employee's] misconduct") (punctuation modified, emphasis in original).

As discussed, Hernden has plausibly alleged that the Board had knowledge of—and took joint action in—the Bednard email. But Pyden sent her email in December 2020—some ten months before Bednard emailed the DOJ in October 2021. Hernden cannot rely on the later Bednard email to support an inference that the earlier email from Pyden—which involved no other alleged Board involvement—sprang from a Board policy or custom. Thus, Hernden has not alleged a "a clear and persistent pattern" of First Amendment violations that apply to Pyden's one-time email sent prior to Bednard's email to the DOJ. *Claiborne*, 103 F.3d at 508 (punctuation modified). A single alleged constitutional violation—of which no other Board members even had alleged knowledge—is insufficient to establish a custom of tolerance or acquiescence. *See, e.g., City of Okla. City v. Tuttle*, 471 U.S. 808, 823-824, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985) ("Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes

proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker."); *Thomas v. City of Chattanooga*, 398 F.3d 426, 432-433 (6th Cir. 2005) (granting summary judgment to school board and rejecting "attempt[] to infer a municipal-wide policy based solely on one instance of potential misconduct"); *Armstrong*, 2005 U.S. Dist. LEXIS 39186, 2005 WL 1705023, at *6 (dismissing claim brought on inaction theory where complaint "mention[ed] one other incident" relating to the alleged misconduct of excessive force, explaining that "an isolated incident alleged in a complaint . . . is not sufficient to show a city policy").

And having failed to allege that other Board members even knew about Pyden's email, Hernden has not plausibly pleaded that the Board "tacit[ly] approv[ed] of the unconstitutional conduct" such that they were deliberately indifferent to First Amendment violations. *Claiborne*, 103 F.3d at 508 (punctuation modified).

Further, Hernden's complaint lacks any allegations that some unidentified Board policy "caused" Pyden to email Hernden's supervisor, which again dooms her *Monell* claim brought on an inaction theory. *See id.* ("[Plaintiff] also fails to allege the required causal connection between her alleged injury and the City's alleged policy.").

In sum, Hernden has failed to satisfactorily allege that liability extends to the District based on Pyden's email. She has not alleged (i) the existence of a custom of tolerance of or acquiescence to "a clear and persistent pattern" of

First Amendment violations, (ii) Board members' notice of such violations, (iii) Board members' tacit approval of such violations, or (iv) a causal connection between the supposed policy and Pyden's decision to send an email. See *Claiborne*, 103 F.3d at 508. The Court grants the District's motion to dismiss to the extent that Hernden's claims for municipal liability are based on Pyden's alleged unconstitutional act.

III. CONCLUSION

For the reasons explained above, the Court grants the District's motion in part and denies the District's motion in part (Dkt. 17).

SO ORDERED.

Dated: June 22, 2023
Detroit, Michigan

/s/ Mark A. Goldsmith
MARK A. GOLDSMITH
United States District Judge